

**THE ‘DE-FRAGMENTATION’ OF INTERNATIONAL
INVESTMENT LAW AND INTERNATIONAL
HUMAN RIGHTS LAW:
A PROCEDURAL BASIS FOR A HOST STATE
HUMAN RIGHTS DEFENCE IN ICSID ARBITRATION**

A thesis submitted for the degree of Doctor of Philosophy

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Abstract

This thesis considers the intersection of international investment law and international human rights law in ICSID arbitration by reference to the 'fragmentation' of public international law. More specifically, it argues that it is possible to establish a procedural basis for a host state human rights defence in ICSID arbitration. Utilising a systemic conception of public international law driven by state consent, it is posited that regime conflict between international investment law and international human rights law in ICSID arbitration justifies the introduction of a host state human rights defence. By reference to the ICSID Arbitral Rules, this thesis establishes a viable basis for the introduction of international human rights law into ICSID arbitration by a host state. Finally, it is argued that a procedural basis for a host state human rights defence in ICSID arbitration has the ability to 'de-fragment' international investment law and international human rights law.

Keywords:

Fragmentation; public international law; international investment law; international human rights law; ICSID arbitration; regime conflict.

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OHCHR, 'Report of the High Commissioner for Human Rights - Human Rights, Trade and Investment' (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9

UNEP, Rio Declaration on Environment and Development (concluded 13 June 1992) UN Doc. A/CONF.151/26 (vol. I)

UNGA, Declaration of the United Nations Conference on the Human Environment (concluded 16 June 1972) UN Doc A/Conf.48/14/Rev. 1 (1973)

UNGA Res 45/94 (14 December 1990) UN Doc A/RES/45/94

UNGA Res 96(1) (11 December 1946) UN Doc A/236

UNGA, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

UNHRC, 'General Comment no 31' on 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13

Other

Iran-United States Claims Tribunal Claims Settlement Declaration (19 January 1981) 20 ILM 223

Restatement (Third) of the Foreign Relations Law of the United States (1987)

OECD, 'Guidelines for Multinational Enterprises'
<<http://www.oecd.org/daf/inv/mne/>> accessed 21 August 2013

Table of Abbreviations

2003 Canadian Model FIPA	Canada Model Foreign Investment Protection and Protection Agreement
2004 USA Model BIT	2004 United States of America Model Bilateral Investment Treaty
2007 Draft Norwegian Model BIT	2007 Draft Norway Model Bilateral Investment Treaty
2012 USA Model BIT	2012 United States Model Bilateral Investment Treaty
ACHR	American Convention on Human Rights
ACIEP Report	Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty
African Charter	African Charter on Human and Peoples' Rights
<i>amicus curiae</i>	Non-Disputing Parties
ARSIWA	ILC Articles for the Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
FDI	Foreign Direct Investment

FTA	Free Trade Agreement
ICA	International Commercial Arbitration
ICAED	International Convention for the Protection of All Persons from Enforced Disappearance
ICC	International Criminal Court
ICC Arbitral Rules	International Chamber of Commerce Rules of Arbitration
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Arbitral Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Institution Rules	Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
IIA	International Investment Agreement
ILC	International Law Commission
ILO	International Labour Organization

ITA	Investment Treaty Arbitration
LCIA Arbitral Rules	London Court of International Arbitration Arbitration Rules
MPRDA	Mining and Petroleum Resources Development Act 28 of 2002 (South Africa)
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
Rio Declaration	Rio Declaration on Environment and Development
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Norms	UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights
UNCITRAL Arbitral Rules	United Nations Commission on International Trade Law Arbitration Rules
VCLT	Vienna Convention on the Law of Treaties

This thesis is accurate as of 1 January 2013.

1. INTRODUCTION

Public international law is intended to regulate conduct between states.¹ The ambitious nature of this aim necessitates that public international law operates in an organised manner to address the breadth of issues that may arise. Consequently, to function as effectively as possible, public international law has divided into discrete legal regimes² by reference to the subject matter that is regulated.³

The classification of public international law into distinct categories results in each legal regime exhibiting unique characteristics⁴ that distinguish it from other legal regimes falling under the umbrella term of ‘public international law’. The distinctiveness of each regime flows from the subject matter being managed and how states seek to respond to the regulatory challenges that arise.⁵ The variations between the regimes become magnified as each regime utilises approaches designed to ameliorate specific problems only encountered as part of the limited subject matter being addressed.⁶ Through this process, each regime becomes more distinctive, and potentially self-governing. As a result, questions are often raised regarding the extent to which each regime evidences the hallmarks of being ‘independent’ and the nature of the interrelationships that may (or may not) exist between legal regimes.⁷ Whether each regime displays characteristics associated with autonomy (and any accompanying notions of self-sufficiency) has implications for public international law’s ability to coherently function as a legal system.⁸ These considerations form the

¹ V Lowe, *International Law* (Oxford University Press 2007) 5; MN Shaw, *International Law* (6th edn, Cambridge University Press 2008) 5.

² The definition of a regime is discussed in Chapter 2, and in particular, section 2.4.1.2.

³ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) UN Doc A/CN.4/L.682, 11.

⁴ Ibid 14.

⁵ Ibid 15.

⁶ Ibid 14.

⁷ O Casanovas, *Unity and Pluralism in Public International Law* (Martinus Nijhoff 2001) 62 – 63; ILC (n 3) 66; B Simma and D Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *European Journal of International Law* 483, 492 - 493; D Lapaš, ‘Some Remarks on Fragmentation of International Law: disintegration or transformation?’ (2007) 40 *The Comparative and International Law Journal of Southern Africa* 1, 5; A Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules: United Terminology of a Fragmented System’ (2011) 22 *European Journal of International Law* 993, 1020.

⁸ ILC (n 3) 14; A-C Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’ (2009) 22 *Leiden Journal of International Law* 1, 4; B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 *European Journal of International Law* 265, 270; S Singh, ‘The Potential of International Law: Fragmentation and Ethics’ (2011) 24 *Leiden Journal of International Law* 23, 24 - 25; E Guntrip, ‘Systemic Integration and International Investment Law’ in J

crux of the debate over whether the establishment, and development, of what have been termed *lex specialis* regimes has initiated the ‘fragmentation’ of public international law.⁹

International investment law and international human rights law are *lex specialis* regimes within public international law.¹⁰ They both focus on a particular subject matter, and have adopted techniques to address specific difficulties encountered in their respective fields.¹¹ Thus, they both exhibit attributes associated with the ‘fragmentation’ of public international law. Therefore, broader concerns regarding the extent to which the process of ‘fragmentation’ is embodied within public international law, and whether public international law remains systemic in nature, are captured by the manner in which the international human rights law regime intersects with the international investment law regime in practice.

The link between the international investment law regime and the international human rights law regime is formed as a result of host state regulatory conduct.¹² The international investment law regime governs foreign direct investment (FDI) and provides protection for foreign investors from host state conduct that is detrimental to the foreign investor’s interests.¹³ Hence, the focus of investment disputes is directed towards the impact of the host state’s conduct on the rights of the foreign investor. However, considerations external to the international investment law regime may influence the host state conduct that is the subject of

Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law Volume 3 2010* (Hart Publishing 2012) 258.

⁹ The term ‘fragmentation’ is utilised in two contexts in public international law. The first relates to the creation of specialist legal regimes in the manner described above. The second refers to the proliferation of international tribunals that may compete for jurisdiction over a particular dispute. The creation of multiple tribunals stems from the evolution of specialist legal regimes. However, discussion of fragmentation in this thesis is limited to the former definition as this study centres on one form of dispute resolution, that is, ICSID arbitration.

¹⁰ ILC (n 3) 11.

¹¹ Ibid.

¹² A Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 *The Journal of World Investment and Trade* 539, 543; SW Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' (2012) 27 *ICSID Review - Foreign Investment Law Journal* 87, 88. For a full discussion of the intersection between host state regulatory conduct and international investment law, see UNHCR, 'Report of the High Commissioner for Human Rights - Human rights, trade and investment' (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9.

¹³ This is achieved through a network of bilateral investment treaties (BITs) and international investment agreements (IIAs). See C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2007) 3 – 8; A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 1 – 2.

review. For example, should an investment cause the human rights of the host state population to be violated, host state conduct intended to protect those human rights may be contemporaneously detrimental to a foreign investor.¹⁴ In these instances, the interaction between international investment law and international human rights law becomes significant.

A host state is legally bound to comply with obligations sourced from both international investment law and international human rights law, despite the application of one regime potentially contradicting obligations under the other.¹⁵ This dichotomy has arisen in a series of claims before investment treaty arbitral panels¹⁶ where justifications for host state regulatory conduct have referred to the need to breach foreign investor's rights, conferred by international investment law, in order to comply with international human rights law. Such human rights have included the 'right' to water,¹⁷ indigenous rights¹⁸ and policies designed to ensure non-discrimination in the aftermath of apartheid regimes.¹⁹ Claims such as these have raised issues concerning how the international investment law regime should manage conflicts with principles sourced in international human rights law. Based on

¹⁴ U Kriebaum, 'Privatizing Human Rights: The Interface between International Investment Protection and Human Rights' in A Reinisch and U Kriebaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 170.

¹⁵ States are bound by international legal obligations and non-compliance with international obligations invokes state responsibility (Article 1, ILC Articles on Responsibility of States for Wrongful Acts in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 77 – 81). See Kriebaum (n 14) 170; M Toral and T Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in M Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 581 – 582.

¹⁶ Many of these claims have stemmed from the Argentine economic crisis in 2001/2002 discussed in Chapter 3. For example, *Siemens A.G. v. Argentine Republic* ICSID Case No. ARB/02/8, Award, 6 February 2007; *Sempra Energy International v. Argentine Republic* ICSID Case No. ARB/02/16, Award, 28 September 2007; *Continental Casualty Company v. Argentine Republic* ICSID Case No. ARB/03/9, Award, 5 September 2008; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (Decision on Liability) ICSID Case No. ARB/03/19, 30 July 2010; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (Decision on Liability) ICSID Case No. ARB/03/17, 30 July 2010; *SAUR International S.A. v. Argentine Republic* ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012.

¹⁷ See *Siemens A.G. v. Argentine Republic*; *Sempra Energy International v. Argentine Republic*; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 16); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*; *SAUR International S.A. v. Argentine Republic* (n 16).

¹⁸ *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012 and *Bernhard von Pezold and others v. Republic of Zimbabwe* ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012.

¹⁹ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* ICSID Case No. ARB(AF)/07/1, Award 4 August 2010.

current jurisprudence, it remains unclear whether these interests can be reconciled,²⁰ and even if this is possible, what the most appropriate methodology would be to achieve the desired integration.²¹

The significance of this dilemma is twofold. First, host states are likely to be faced with a normative conflict.²² A host state's adherence to international human rights standards may contemporaneously breach protections offered in accordance with the international investment law regime to foreign investors. The existence of mutually exclusive legal requirements may thus give rise to a host state's liability in the international arena for non-compliance with an international obligation.²³ Secondly, this issue directly affects those individuals seeking to rely on the benefits conferred upon them. The individuals concerned may be foreign investors safeguarded by international investment law, or host state populations, negatively affected by FDI, seeking the protection conferred by international human rights law. When host states are unable to comply with either of these obligations as a result of fulfilling the other, a loss of protection arises for either the foreign investor or the host state population. This scenario may also give rise to a host state's liability in public international law.²⁴ Consequently, the issue of whether public international law displays characteristics associated with 'fragmentation' takes on a wider significance rather than primarily constituting a theoretical question.

Normative conflict and potential host state liability reflect only one perspective of the 'fragmentation' of public international law. Dispute resolution procedures also influence the degree of segregation that exists between *lex specialis* regimes.²⁵ In response to the specific nature of investment disputes, the international investment law regime has generated a unique form of dispute resolution in the form of investment treaty arbitration (ITA).²⁶ ITA confers foreign investors with the right to claim directly against host states for violations of investment protection standards

²⁰ As yet, no investment treaty tribunal has fully addressed the intersection of international investment law and international human rights law.

²¹ The viability of several methodologies is considered in Chapter 6.

²² This concept is addressed fully in Chapter 6.

²³ Article 1, ILC Articles on Responsibility of States for Wrongful Acts in Crawford (n 15) 77 - 81.

²⁴ Ibid.

²⁵ T Treves, 'Fragmentation of International Law: the Judicial Perspective' (2007) 23 *Comunicazioni e Studi* 821, 827.

²⁶ G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121, 122.

in accordance with the terms of the international investment agreement (IIA) that governs the FDI.²⁷ However, the creation of ITA has impacted upon the ‘fragmentation’ of the international investment law and international human rights law regimes. This is particularly true of ITA in the form of ICSID arbitration, due to the specific circumstances in which it evolved.

IIAs and ITA were established as part of international investment law in response to calls for a New International Economic Order (NIEO) made during the 1960s and 1970s.²⁸ The NIEO was an ideological claim made by newly independent developing states that sought global economic reform in order to achieve economic independence as well as political independence.²⁹ Given their lack of economic independence, developing states embraced expropriation as a means of achieving economic liberation, giving rise to investment disputes and political uncertainty for foreign investors.³⁰

At this time, the World Bank, which had been directly involved in the resolution of several foreign investment disputes, initiated plans for a specialised dispute resolution mechanism to address these disputes and to instil foreign investors with confidence in light of the on-going political risk.³¹ These plans resulted in the entry into force in 1966 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States³² (ICSID Convention),³³ which established the International Centre for the Settlement of Investment Disputes (ICSID) in 1967.³⁴ To administer the dispute resolution process, a definitive set of arbitral rules governing ITA came into effect on 1 January 1968³⁵ (ICSID Arbitral

²⁷ Newcombe and Paradell (n 13) 1 - 2.

²⁸ JW Salacuse, 'The Treatification of International Investment Law' (2007) 13 Law and Business Review of the Americas 155, 155; Newcombe and Paradell (n 13) 33; Guntrip (n 8) 260.

²⁹ M Bedjaoui, *Towards a New International Economic Order* (United Nations Educational, Scientific and Cultural Organisation 1979) 85; A Parra, *The History of ICSID* (Oxford University Press 2012) 11.

³⁰ Parra (n 29) 12.

³¹ Ibid, 21; Newcombe and Paradell (n 13) 27; M Stevens, 'The ICSID Convention and the Origins of Investment Treaty Arbitration' in A Jan Van Den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Wolters Kluwer 2009) 69 – 70.

³² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 171 (ICSID Convention).

³³ Parra (n 29) 97.

³⁴ Ibid.

³⁵ Ibid 117.

Rules).³⁶ The combined effect of these instruments was to establish ICSID arbitration, a specialised form of dispute resolution that would solely be used for investment disputes, monitored under the auspices of ICSID (which unlike the World Bank, was able to act as a dedicated institution). Whilst the narrow focus of ICSID's remit contributed to it becoming the pre-eminent body that administers investment disputes, it also limited the ability of ITA conducted under the ICSID Arbitral Rules to readily incorporate principles sourced from other regimes within public international law, thereby isolating international investment law from other fields of public international law. Consequently, the specialist manner in which the international investment law regime has addressed dispute resolution has contributed to the 'fragmentation' of this regime from international human rights law.

In conclusion, the embodiment of the 'fragmentation' of public international law, as evidenced by the interrelationship of international investment law and international human rights law, gives rise to both theoretical and pragmatic concerns. The inability of international investment law and international human rights law to integrate may result in host state liability and deny individual protections under either regime. The likelihood that these outcomes will eventuate is magnified by the limited focus of ICSID arbitration as the exemplar form of dispute resolution for investment disputes. This thesis seeks to resolve these dilemmas by 'de-fragmenting' international investment law and international human rights law.

1.1 ACHIEVING 'DE-FRAGMENTATION'

In light of the above, this thesis considers the extent to which international investment law and international human rights law are 'fragmented' in public international law and examines their ability to intersect within ICSID arbitration. It posits that these regimes, whilst specialist, are not fragmented to such a degree that excludes their mutual application within the framework of the ICSID Convention and the ICSID Arbitral Rules.

³⁶ ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitral Rules) available at <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain>> accessed 4 July 2013.

To demonstrate this proposition, this thesis proposes a procedural basis on which international investment law and international human rights law can be ‘de-fragmented’ in ICSID arbitration by way of a host state human rights defence. Examining the procedural basis for a host state human rights defence in ICSID arbitration serves a dual purpose. First, it demonstrates the current ability of international investment law and international human rights law to interact within the specialist scope of ICSID arbitration. Additionally, it highlights where the regimes have the potential to become further ‘de-fragmented’ and how this might be attained. This analysis is achieved by reference to the theoretical considerations that underlie the process of ‘fragmentation’.

At variance to some recent works,³⁷ this thesis focuses on a party centric viewpoint, rather than relying on conceptions of what has been termed as the ‘global public interest’. Although this line of thought is valuable, it is the author’s view that a similar result can be achieved without reference to this particular theory. A party centric view is also adopted so that the host state human rights defence has the potential to be directly applied in ICSID arbitration.

To achieve its aims, this thesis is both expositive and evaluative in nature. It is expositive as it ascertains the current scope of the law and identifies the degree to which it permits the interaction of international investment law and international human rights law within the framework of ICSID arbitration. The identification of this relationship is undertaken by reference to both primary and secondary sources, in addition to jurisprudence. The limits that are identified form the basis of the evaluative analysis. This utilises the theoretical framework outlined in Chapter 2 as its evaluative gauge, and measures the degree to which the interaction between international investment law and international human rights law within ICSID arbitration displays characteristics associated with ‘fragmentation’. By reference to this evaluation, subsequent discussion focuses on the manner in which a host state human rights defence is able to rectify the deficiencies identified and become operational in ICSID arbitration.

³⁷ A Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012); B Choudhury, 'International Investment Law as a Global Public Good' (Lewis & Clark Law School's 17th Annual Business Law Fall Forum 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181414> accessed 4 July 2013.

To address the issues raised, this thesis is divided into two parts. Part A assesses the current degree of interaction between international investment law and international human rights law. It proceeds with this appraisal in two stages.

Chapter 2 outlines the understanding of public international law used in this thesis by reference to three key concepts. The first relates to the legal basis on which public international law is deemed to be binding. A consent driven positivist stance is adopted, not because this is necessarily the most accurate depiction of public international law, but because it provides the most challenging understanding of public international law within which to establish a host state human rights defence. The implications of a positivist conception of public international law are then discussed by reference to the notion of international legal personality. This is significant because IIAs confer rights upon foreign investors, who do not inherently possess international legal personality, to enable them to utilise ICSID arbitration. Finally, the systemic operation of public international law is considered in order to establish a definition of ‘fragmentation’, and in light of this definition, examination turns to the impact of ‘fragmentation’ on public international law’s systemic nature, with a particular focus on regime conflict.

Chapter 3 builds upon this foundation by highlighting instances of regime conflict between international investment law and international human rights law to justify the introduction of a host state human rights defence. By undertaking this analysis, it is possible to identify where both regimes are currently fragmented. Consideration is given to the latest generation of IIAs, focusing on recent BIT practice, to determine the manner in which states are attempting to address the intersection of international investment law and international human rights law. ICSID arbitral practice is then isolated to determine the attitude of all participants in the ICSID arbitral system. Finally, the effectiveness of *amicus curiae* procedures, as the primary means of introducing human rights considerations within ICSID arbitration, albeit by third parties, is discussed. The chapter concludes by establishing the key attributes required of a host state human rights defence in light of this discussion.

Having identified where fragmentation between international investment law and international human rights law exists, Part B seeks to ascertain a viable means of introducing international human rights law into ICSID arbitral proceedings. Chapter 4 examines the manner in which a host state human rights defence could be established in ICSID arbitration on procedural grounds. Two approaches are considered. The first seeks to deny an ICSID tribunal of its jurisdiction by relying on ‘in accordance with host state law’ clauses. The effect of these clauses is to deny an ICSID arbitral tribunal the requisite state consent to proceed to ICSID arbitration on the merits of the claim. Therefore, these clauses could be invoked by a host state to deny the jurisdiction of an ICSID arbitral tribunal should a foreign investor’s violations of international human rights law simultaneously breach host state law. The second approach considers the role of admissibility, and whether there are policy justifications that merit an ICSID arbitral tribunal refusing to hear a claim when a foreign investor has violated international human rights law.

Chapter 5 addresses the means of establishing a substantive host state human rights defence by way of counterclaim procedures sourced from the ICSID Arbitral Rules. This chapter examines the scope and application of ICSID counterclaim procedures to determine how they could be used to establish a host state human rights defence. As part of this analysis, the impact of a foreign investor’s limited international legal personality on the proposed host state human rights defence is discussed. To illustrate the potential operation of a host state human rights defence founded on counterclaim procedures, the extent to which an ICSID arbitral tribunal is able to apply international human rights law is discerned by reference to the scope of the ICSID Convention’s provisions that address applicable law.

The final chapter of the thesis outlines the conclusions of this study by arguing that the ‘de-fragmentation’ of international investment law and international human rights law is possible given that a procedural basis for a host state human rights defence in ICSID arbitration exists.

1.2 LIMITATIONS OF THIS STUDY

As with any study, this thesis is subject to certain assumptions and limitations. The first limitation concerns the scope of the thesis, which excludes any discussion of the remedies available as a result of invoking the host state human rights defence. This is

because the study focuses on the role of ‘fragmentation’ as a limiting factor precluding the interaction of international investment law and international human rights law. As such, once international human rights law is introduced into ICSID arbitration effectively, and can be applied in an appropriate manner, the regimes have been ‘de-fragmented’. Available remedial measures do not impact the ‘de-fragmentation’ of these regimes within ICSID arbitration, and are therefore beyond the scope of the current research.

Whilst any individual that falls within the definition of an investor in the applicable IIA is protected,³⁸ corporate bodies undertake almost all large-scale investment. Consequently, this thesis, while addressing FDI generally, tends to focus on foreign investors that use a corporate form. In some instances, host states require that corporate investors incorporate in accordance with local laws.³⁹ Thus, these corporate bodies are technically not foreign investors. However, the definition of investor in most IIAs attributes these corporate bodies with the status of a foreign investor.⁴⁰ This thesis will take a similar approach. Although some issues may be applied differently in instances where the foreign investor is registered as a host state corporation, they will be treated as being registered in a different jurisdiction on the basis of their foreign control.⁴¹

This thesis seeks to focus specifically on the interaction of international investment law and international human rights law. In so doing, at times it recognises the relationship between international human rights law and, for example, international environmental law. Nevertheless, the majority of the thesis focuses on ‘pure’ human rights instruments. In particular, it limits consideration to the nine core UN instruments and three regional human rights instruments.⁴² Examples are drawn

³⁸ Newcombe and Paradell (n 13) 68.

³⁹ Ibid 68 – 69.

⁴⁰ Ibid 69.

⁴¹ For further consideration of this issue see L Schicho, *State Entities in International Investment Law* (Nomos Publishers 2012).

⁴² These are the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1961) 660 UNTS 195 (ICERD); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Convention on the Rights

from these instruments to illustrate specific points and to highlight differences, but in the vast majority of cases, the arguments raised in this thesis apply to all of these legal documents.

Finally, this study is limited to consideration of the ICSID Arbitral Rules. Whilst other arbitral rules may be applied to ITA,⁴³ these are primarily intended for international commercial arbitration (ICA) and do not specifically address the unique characteristics of ITA. As a result, they cannot be said to form part of the specialist regime of international investment law. The ICSID Arbitral Rules do fulfil this remit as they are the pre-eminent investment arbitral rules and govern the conduct of the only specialist international investment law dispute resolution forum.

of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 39481 (ICRMW); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, Annex I (ICRPD); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) Doc.A/61/488 (ICAED); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR); American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 144 UNTS 123 (ACHR); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter). Reference is also made to the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

⁴³ For example, United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitral Rules); International Chamber of Commerce Rules of Arbitration (ICC Arbitral Rules); London Court of International Arbitration Arbitration Rules (LCIA Arbitral Rules).

PART A

**AN EVALUATION OF THE CURRENT INTERACTION
BETWEEN INTERNATIONAL INVESTMENT LAW
AND INTERNATIONAL HUMAN RIGHTS LAW
WITHIN ICSID ARBITRATION**

2. PUBLIC INTERNATIONAL LAW AS AN EVALUATIVE FRAMEWORK

2.1 INTRODUCTION

Given its state centric approach, public international law displays unique characteristics that distinguish it from domestic legal systems. As a result, it is difficult to definitively categorise the manner in which public international law functions and to provide a thorough theoretical foundation to explain its operation. Questions regarding the existential basis of public international law have accompanied its development, resulting in differing formulations of the jurisprudential foundations of public international law. Therefore, there is no single, uniform conception of public international law. In light of public international law's apparent fragmentation, questions referring to the theoretical basis of public international law remain relevant, and if anything, have become more pervasive. Therefore, this chapter seeks to contextualise what is meant by 'public international law' by reference to established jurisprudence. In doing so, it does not seek to reconsider the foundations of public international law, but rather, due to the variety of approaches that may be taken, it outlines the understanding of public international law that is utilised in this thesis, in order to place the current study within the framework of the preceding debates.

The concept of 'public international law' will first be considered in light of legal theory. This section considers the impact of competing schools of legal philosophy that can broadly be described as naturalism and positivism. In doing so, it is contended that a host state human rights defence can be introduced into ICSID arbitration without the need to adopt an overtly conducive theoretical basis, such as naturalism. Moreover, it is argued that by adopting a positivist conception of public international law, the foundations for a host state human rights defence are strengthened.

In light of the positivist conception of public international law adopted, the chapter proceeds to consider the position of the foreign investor in public international law. As a non-state entity, a foreign investor is only conferred with rights and responsibilities to the extent that they are bestowed with international

legal personality.¹ Which entities possess international legal personality is dependent on the theoretical foundation adopted.² By assuming a consent driven positivist stance as the foundation of public international law in this thesis, it is submitted that the scope of a foreign investor's international legal personality is contingent upon the conferral of state consent. Consideration in this section will focus on the jurisprudential formulation of international legal personality adopted within this thesis. The practical significance of this concept for the establishment of a host state human rights defence will be discussed in more detail in Chapter 5 of this thesis.

Having outlined the broader context in which this thesis considers public international law to operate, the chapter then proceeds to examine what is meant by the fragmentation of public international law, and as a corollary, the author's intention behind the use of the term 'de-fragmentation'. This section conceptualises the wider operation of public international law, of which international investment law and international human rights law form part, to understand how both regimes are thought to interact with each other. It is posited that public international law broadly operates in a systemic manner.

The chapter concludes by linking the theoretical foundations discussed to the main argument formulated throughout this thesis.

2.2 NATURALISM, POSITIVISM AND PUBLIC INTERNATIONAL LAW

By proposing a procedural basis for a host state human rights defence, this thesis argues that host states can justify violations of IIAs by reference to international human rights law within ICSID arbitration. Therefore, this thesis evidences an approach that supports the inclusion of altruistic considerations within international investment law. Those who oppose this position are likely to take the view that this argument is based on a moral stance, and that human rights do not belong within a legal regime that is primarily aimed at protecting a foreign investor, seeking to make economic gains in a foreign jurisdiction, from the vagaries of host state regulation.³

¹ F Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) 9 Melbourne Journal of International Law 47, 50.

² Ibid; MN Shaw, *International Law* (6th edn, Cambridge University Press 2008) 196; R Hansen, 'The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap' (2010) 10 Global Jurist 1, 10.

³ An indication of this view is given in *Bernhard von Pezold and others v. Republic of Zimbabwe* ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012 [57] – [60] and *Border Timbers*

Such an argument is precisely why this section considers the role of morality in law from a theoretical perspective. It is by identifying how streams of legal philosophy approach the significance of morality, that the appropriate formulation of public international law can be identified, that will not only permit the introduction of international human rights law into international investment law and ICSID arbitration, but also fully address counter-arguments including the one raised above. To consider the available methodologies in more detail, this section briefly outlines the opposing legal philosophies of naturalism and positivism, before justifying the stance taken in this thesis. In doing so, this section cannot elaborate upon all manifestations of both of these schools of thought. Consequently, it focuses on the common elements that are generally associated with each philosophy, rather than the works of individual philosophers.

Naturalism, or natural law, refers to an understanding of law that deems that law and morality should be intertwined.⁴ More precisely, its foundation is that law gains authority from its basis in morality. The earliest progenitors of this view, such as Aquinas, linked law to ethics, espousing that ‘an unjust law is no law at all’.⁵ The theological underpinning of natural law at this time made identifying what was ‘just’ referable to the laws of God.⁶ However, the dominant purpose of ‘just law’ was that it served, and promoted, human good.⁷ A law that lacked this purpose could, therefore, either fail to bind in a moral sense, or alternatively be devoid of both moral and legal effect, depending on how Aquinas’ proposition is construed.⁸ On either interpretation, an unjust law was not a fully effective law.⁹

Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. Republic of Zimbabwe ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012 [57] – [60].

⁴ K Greenawalt, 'How Persuasive is Natural Law Theory?' (2000) 75 *Notre Dame Law Review* 1647, 1651.

⁵ T Aquinas, *Summa Theologica* (Benziger Bros 1947) question 96, article 4.

⁶ P Soper, 'In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All' (2007) 20 *Canadian Journal of Law and Jurisprudence* 201, 203; J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 41.

⁷ Greenawalt (n 4) 1651; R West, *Normative Jurisprudence: An Introduction* (Cambridge University Press 2011) 31.

⁸ B Bix, 'Natural Law Theory' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers 1999) 226; West (n 7) 17 – 18.

⁹ N MacCormick, 'Natural Law and the Separation of Law and Morals' in RP George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992) 106; Bix (n 8) 226.

Early jurisprudential scholars in public international law initiated conceptions of law that departed from natural law thinking,¹⁰ giving rise to the ideology of positivist law.¹¹ Positivism separates law and morals,¹² and instead focuses on the legitimacy of sources of law within the legal system, so as to confer law with binding authority. The authority required to confer law with its binding nature varies depending on the conception of positivism adopted.¹³ The main consequence of positivism is that social constructs, such as the state or a sovereign, rather than reference to a divine ruler or a human good, determine the validity of the law.¹⁴ Thus, law may reflect the moral position of society, but by itself, this is insufficient to bind those subject to the law.¹⁵ Equally, a valid law by reference to its source may be deemed to be unjust.¹⁶ Consequently, law is identified in an empirical manner whilst any evaluation of the merits of the law occurs at a subsequent stage.¹⁷

¹⁰ Bix (n 8) 227; S Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *European Journal of International Law* 269, 273 – 274. These included Pufendorf, Wolff and Vattel. See A Orakhelashvili, 'The Origins of Consensual Positivism-Pufendorf, Wolff and Vattel' in A Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 93 onwards.

¹¹ d'Aspremont (n 6) 83. Hobbes and Bentham further developed the bases of positivist theory. See *ibid* 42 – 46.

¹² J Waldron, 'The Irrelevance of Moral Objectivity' in RP George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992) 160; McCormick (n 9) 107; J Goldsworthy, 'Fact and Value in the New Natural Law Theory' (1996) 41 *The American Journal of Jurisprudence* 21, 21; B Simma and AL Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 302, 304; S Coyle, 'Positivism as a Statist Philosophy of Law' (2008) 59 *Northern Ireland Legal Quarterly* 49, 51; MV Totaro, 'Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development' (2008) 48 *Vanderbilt Journal of International Law* 719, 724, 730; T-H Cheng, 'Positivism, New Haven Jurisprudence, and the Fragmentation of International Law' in T Weiler and F Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Walde* (Martinus Nijhoff Publishers 2011) 425.

¹³ For example, Austin sources the authority of law to the command of the sovereign. Compliance results from the sanctions that flow from disobeying the law (Soper (n 6) 205; JL Coleman and B Leiter, 'Legal Positivism' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers 1999), 244 – 245). Whereas Hart distinguishes between laws that set out obligations, and secondary rules that confer authority upon these rules (*ibid*, 244 – 245). The legal system justifies the coercion (Soper (n 6) 205).

¹⁴ McCormick (n 9) 107; Waldron (n 12) 160; Coleman and Leiter (n 13) 241; Soper (n 6) 205; Totaro (n 12) 724 – 725; Cheng (n 12) 425.

¹⁵ McCormick (n 9) 107; Coleman and Leiter (n 13) 241. Incorporationism, a variation on positivism, permits the inclusion of moral principles into law, provided the rule of recognition incorporates morality into law (*ibid*, 251 – 252). However, such a position is rejected by Dworkin (who considers that morality may be introduced by way of interpretation) and Raz (who considers that authority is drawn from convergent conduct by officials (*ibid*, 255)).

¹⁶ West (n 7) 60; SR Ratner, 'From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities' in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 155.

¹⁷ Soper (n 6) 206; d'Aspremont (n 6) 39.

Modern approaches to natural law have responded to the detachment of law and morality that forms the basis of positivism. As a result, recent conceptions of natural law do not necessarily base morality on ethical considerations.¹⁸ Rather, these philosophies concentrate on whether law reflects social practice and social institutions.¹⁹ In particular, they reject an acceptance of law derived from an authoritarian source that is devoid of the social or moral environment from which it is drawn.²⁰ By referring to an idealised moral position, naturalism has been criticised by positivists for not distinguishing between what the law 'is', and naturalists' views as to what the law 'ought to be'.²¹

In the context of public international law, naturalism formed the basis of early legal scholarship.²² This was in part due to the lack of a hierarchical structure within public international law, given that a source of ultimate sovereignty is difficult to identify²³ in light of a lack of international legislature and the equality of states.²⁴ However, it was the same characteristics that justified a swing to a positivist conception of public international law. As states were unable to defer to a higher authority or greater good in a naturalist sense either, it was contended that the only means available for states to relinquish their sovereign power was through state consent.²⁵ Therefore, rather than determining the law by reference to moral considerations, consensual agreement between states became the social construct that validated international legal principles. At present, a predominantly positivist approach is accepted within public international law,²⁶ with the need for consent underpinning fundamental aspects of the legal system, such the sources of public

¹⁸ See Greenawalt (n 4) 1652.

¹⁹ For example, J Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) who used Aquinas as the foundation of his treatise, but differentiates between natural law and the will of God (48 – 49). However, Finnis does not consider natural law theory to deem a law as valid. See d'Aspremont (n 6) 84.

²⁰ Bix (n 8) 231.

²¹ MacCormick (n 9) 107; Simma and Paulus (n 12) 304.

²² Hall (n 10) 270.

²³ Totaro (n 12) 723; D Dyzenhaus, 'Positivism and the Pesky Sovereign' (2011) 22 *European Journal of International Law* 363.

²⁴ Totaro (n 12) 724.

²⁵ Hall (n 10) 282 – 283.

²⁶ Ratner (n 16) 155.

international law (primarily treaties),²⁷ and key institutions (including the International Court of Justice (ICJ)).²⁸

The introduction of international human rights law into ICSID arbitration, which arguably draws from humanitarian, and thus moral justifications, could indicate a predilection towards natural law thinking. Instead, this thesis deliberately seeks to establish a host state human rights defence by relying on a positivist approach to increase the prospects of its widespread acceptance. A naturalist perspective would militate against the potential acceptance of a host state human rights defence given the broadly positivist stance that forms the foundations of modern public international law. Further, a naturalist approach would leave the introduction of a host state human rights defence vulnerable to claims that the defence can only be established when supported by a theoretical basis that is conducive to moral or social justifications. Such a perception would undermine the credibility of the defence and lead to debate regarding whether the defence would apply outside of this naturalist framework. In contrast, when based on positivism and state consent, the defence clearly demonstrates its feasibility without reference to wider considerations of morality. Consequently, this thesis utilises existing legal obligations, to which states have already consented, in order to demonstrate that a valid host state human rights defence can be established in ICSID arbitration. This avoids the critique that a host state human rights defence is promoting what the law ‘ought to be’ rather than what it actually ‘is’.

2.3 FOREIGN INVESTORS AND PUBLIC INTERNATIONAL LAW

The adoption of a positivist, state driven conception of public international law strengthens the viability of a host state human rights defence. However, by focusing on the element of state consent in public international law, it raises theoretical questions regarding the rights and responsibilities of non-state actors, such as foreign investors, under public international law. The extent to which foreign investors can be considered to be actors in the international arena depends on the degree to which

²⁷ Treaties enter into force following the required number of ratifications, which is an expression of state consent. See Articles 2(1)(b), 14(1) and 16 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

²⁸ The contentious jurisdiction of the International Court of Justice (ICJ) is established by way of consent. See Article 36 Statute of the International Court of Justice.

they exhibit international legal personality.²⁹ The basis of international legal personality is conditional on the theoretical foundation that is accepted.³⁰ Therefore, this section considers the concept of international legal personality within a positivist framework by setting out the theoretical grounding utilised in this thesis.

2.3.1 International Legal Personality

International legal personality refers to the ability of an entity to possess rights and responsibilities governed by public international law.³¹ International legal personality stems from the Vattelien conception of the state as a separate legal persona.³² Prior to this formulation, both states and individuals³³ were considered to be actors for the purposes of public international law.³⁴ However, the widespread adoption³⁵ of the view that the state has the capacity to act as an independent legal entity resulted in a state driven conception of public international law³⁶ that excluded other actors, and in particular, individuals.³⁷ A further consequence of this altered dynamic was the adoption of the ‘subjects’ doctrine,³⁸ which distinguished between those who had the capacity to create, and be bound by, public international law

²⁹ Green (n 1) 50.

³⁰ Ibid; Shaw (n 2) 196; Hansen (n 2) 10.

³¹ Shaw (n 2) 196; A Gatto, *Multinational Enterprises and Human Rights* (Edward Elgar 2011) 48 – 49.

³² JE Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (T.M.C. Asser Press 2004) 83; R Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 35 – 36.

³³ The term ‘individual’ in this section is used inclusively to address both natural and legal persons, thereby encompassing foreign investors.

³⁴ Early theories regarding the role of public international law deemed it to either govern individuals *qua* individuals or addressed the conduct of individuals in their capacity as an element of the state. For example, the law of nations established by Grotius was not driven by a modern conception of the state (M St Korowicz, 'The Problem of the International Personality of Individuals' (1956) 50 *The American Journal of International Law* 533, 534). Rather, it focused on the acts of individuals involved in the conduct of international relations (ibid; Nijman (n 32) 50). Hobbes, Pufendorf and Wolff developed conceptions of the state as a separate entity (H Aufrecht, 'Personality in International Law' (1943) 37 *The American Political Science Review* 217, 217 – 219; St Korowicz (n 34) 534; Portmann (n 32) 36 – 37). However, they considered that both the state and the individual were bound by public international law, and in doing so, conferred recognition upon individuals within this sphere (St Korowicz (n 34) 534; Portmann (n 32) 34 – 35).

³⁵ A Bianchi, 'Globalization of Human Rights: The Role of Non-state Actors' in G Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 180.

³⁶ Nijman (n 32) 83; Portmann (n 32) 35 – 36; A Clapham, *Brierly's Law of Nations* (7 edn, Oxford University Press 2012) 36 – 40.

³⁷ J Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in J Petman and J Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers 2003) 355; Nijman (n 32) 83; Green (n 2) 51; Portmann, (n 32) 35 – 36.

³⁸ R Higgins, *Problems and Processes: International Law and How We Use It* (Clarendon Press 1994) 49; Nijman (n 32) 83; see St Korowicz (n 34) 535. For a discussion of Leibniz' political philosophy which established this doctrine, see Nijman (n 32) 58 – 80.

(subjects)³⁹ and those whose conduct was controlled by the subjects of the international law (objects).⁴⁰ Given their independent legal persona, states were conferred with subject status,⁴¹ whilst individuals were classified as objects⁴² and only bound by principles of public international law when re-formulated as municipal legal obligations.⁴³ As a result, states became the primary holders of international legal personality.

Vattel's theory has generated conceptual difficulties regarding the interaction of individuals and states from the perspective of international legal personality in public international law. In essence, the issue is one of whether the legal construct of the state should be considered the key protagonist in the international legal system, or whether individuals remain the prime concern, given that the state is merely a collective representation of individuals.⁴⁴ To address these challenges, varied theories relating to international legal personality have been developed in an attempt to understand the respective roles of states and individuals within the international legal system. These approaches can be broadly categorised into those that prioritise the international legal personality of the state, and in doing so, minimise or exclude the role of the individual,⁴⁵ and those that seek to reject Vattel's theory and confer parity within international legal relations upon both the state and the individual.⁴⁶

³⁹ OI Tiunov, 'The International Legal Personality of States: Problems and Solutions' (1993) 37 St Louis University Law Journal 323, 324. Regarding the difficulties of defining a 'subject' of international law see Klabbbers (n 37) 352.

⁴⁰ H Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 Law Quarterly Review 438, 439; H Lauterpacht, 'The Subjects of International Law' in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht Volume I: The General Works* (Cambridge University Press 1970) 137; Hansen (n 2) 12.

⁴¹ Lauterpacht, 'The Subjects of the Law of Nations' (n 40) 439; Lauterpacht, 'The Subjects of International Law' (n 40) 136; Higgins (n 38) 48.

⁴² Lauterpacht, 'The Subjects of the Law of Nations' (n 40) 440.

⁴³ Tiunov (n 39) 333.

⁴⁴ See Aufricht (n 34); Lauterpacht, 'The Subjects of International Law' (n 40) 147 – 149; J Klabbbers, 'Legal Personality: The Concept of Legal Personality' (2005) 11 *Ius Gentium* 35, 39 – 50.

⁴⁵ This view evidences the positivist understanding of public international law (see Portmann (n 32) 42 – 79). The primacy of states under this conception is seen to stem from their sovereignty (Aufricht (n 34) 230), with individuals 'submit[ing] to the legal order of the state in which they are found' (Tiunov (n 39) 333). Consequently, in accordance with this view, international legal obligations must be adopted by the state as municipal legal obligations in order to bind the individual (See *Polish Postal Service in Danzig* (Advisory Opinion) PCIJ Rep Series B No 11, 17 – 18).

⁴⁶ When asserting the role of the individual within public international law, focus is often placed on the individuals and states being equal beneficiaries of the humanitarian purposes of international law, for example, Lauterpacht, 'The Subjects of the Law of Nations'; Lauterpacht, 'The Subjects of International Law'. See K Nowrot, 'Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities' (2006) 80 *Philippine Law Journal* 563, 572; Portmann (n 32) 126, 133. Alternatively, they consider the extent to

Having adopted a positivist viewpoint of public international law that is reliant on state consent, this thesis adopts a conception of public international law in which international legal personality may be conferred upon individuals, but only with the consent of the state. In doing so, it prioritises the Vattelien state centric approach, taking as its starting point that the role of individuals is limited to that of objects, rather than subjects of public international law. This standpoint ensures that a consistent theoretical basis is adopted throughout this thesis. Similarly to the stance taken in relation to positivism, this conservative approach also demonstrates that a host state human rights defence is feasible, even to those that seek to curtail the role of individuals within public international law. The operation of this state-centric formulation of public international law in relation to international legal personality will now be considered in more detail.

2.3.2 The Role of State Consent

Under a state driven understanding of public international law, states possess international legal personality.⁴⁷ This results in states being the primary holders of both rights and duties in public international law.⁴⁸ In order to confer international legal personality (and any attending rights and duties) on other entities, states need to relinquish their rights as the exclusive holders of international legal personality. The ICJ has recognised two instances in which other entities may be conferred with international legal personality by states. The first is when states expressly confer such a right through the use of specific treaty language.⁴⁹ The second is by implication through state conduct.⁵⁰

The *LaGrand*⁵¹ decision evidences the express conferral of international legal personality through a treaty provision. The decision in *LaGrand* was in response to a claim by Germany challenging the United States of America regarding the use of the death penalty in relation to two German nationals in instances where the convicted individuals had not been informed of their rights to consular access in accordance

which individuals already participate in law creation within the public international law framework, For example, Higgins (n 38) 48 - 55. See Portmann (n 32) 210, 212.

⁴⁷ Green (n 1) 51.

⁴⁸ Ibid.

⁴⁹ Hansen (n 2) 13; Portmann (n 32) 82.

⁵⁰ Hansen (n 2) 13; Portmann (n 32) 82.

⁵¹ *LaGrand (Germany v USA)* (Judgment) [2001] ICJ Rep 466.

with Article 36(1)(b) of the Vienna Convention on Consular Relations^{52, 53} This provision provides, in part, that ‘the said authorities shall inform the person concerned without delay of his rights under this subparagraph’. When interpreting the language of this provision, the ICJ emphasised the use of ‘*his rights*’ within the clause, and held that ‘Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person’.⁵⁴ Consequently, the ICJ focused on the specific language of the treaty, and in particular, to its reference to the individual (rather than the state) in the terminology of the provision. This was deemed sufficient to grant the right to be informed of consular assistance directly upon the individual, as opposed to it being considered a right of the state exercised in the interests of the individual.⁵⁵ As this provision created an individual right, Germany was entitled to exercise diplomatic protection on behalf of the nationals concerned to enforce this right against the United States of America in the ICJ.⁵⁶

Hence, under this formulation, should a state confer rights or responsibilities upon a non-state actor through a treaty provision, the non-state actor acquires international legal personality to the extent permitted by the treaty provision. For example, IIAs permit foreign investors to initiate ICSID arbitration against host states through the use of treaty language directed at the foreign investor. While IIAs may vary in the terminology used to convey legal standing upon an investor, the ability of an investor to commence ICSID arbitration is considered to be a right that is directly conferred upon the investor, rather than their home state.⁵⁷ This interpretation accords with the drafting intentions behind the ICSID Convention:

[F]rom a legal point of view the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum,

⁵² Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

⁵³ *LaGrand (Germany v USA)* (n 51) 471 – 473.

⁵⁴ *Ibid* 494.

⁵⁵ O Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction Under Bilateral Investment Treaties' (2004) 20 *Arbitration International* 179, 183.

⁵⁶ See R Jennings, 'The LaGrand Case' (2002) 1 *The Law and Practice of International Courts and Tribunals* 13, 47 – 48.

⁵⁷ Spiermann (n 55) 185.

thus contributing to the growing recognition of the individual as a subject of international law.⁵⁸

In the case of *Occidental v Ecuador*,⁵⁹ the English High Court stated its understanding of the role of IIAs by confirming that ‘the State Parties to the BIT intended to give investors the right to pursue, in their name and for themselves, claims against the other State party’.⁶⁰ The transition from state centric dispute resolution to one in which individuals may commence proceedings under the ICSID Convention, was also noted by the *SGS v Philippines*⁶¹ tribunal when it recognised that ‘under modern international law, treaties may confer rights, substantive and procedural, on individuals’.⁶² Although it remains unclear whether by initiating a claim the investor is conferred with a procedural or a substantive right in ITA,⁶³ these authorities indicate that IIAs, through their express provisions can confer specific rights on individuals. By doing so, IIAs confer limited international legal personality to enable foreign investors to commence a claim in accordance with the ICSID Institution Rules.

Whilst the use of express terms evidences a clear intention of the state to confer rights to the individual, this may also be achieved implicitly. In the *Reparations Advisory Opinion*,⁶⁴ the ICJ considered whether the United Nations (UN) had international legal personality. This question was raised in the broader context of whether the UN had the ability to bring a claim against Israel following the death of Count Bernadotte in his capacity as UN Mediator for Palestine.⁶⁵ The ICJ recognised that international legal personality was not limited to states⁶⁶ and

⁵⁸ A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Recueil des Cours de l'Académie de Droit Internationale* 331, 349.

⁵⁹ *Republic of Ecuador v. Occidental Exploration and Production Company* [2005] EWHC 774 (Comm) (HC QBD).

⁶⁰ *Ibid* [61].

⁶¹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

⁶² *Ibid* [154]. See also *Gas Natural SDG, S.A. v. Argentine Republic* ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 [34].

⁶³ Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 162 – 164; A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *American Journal of International Law* 179, 184 – 185.

⁶⁴ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

⁶⁵ A Reinisch, *International Organizations Before National Courts* (Cambridge University Press 2000) 55.

⁶⁶ *Reparation for Injuries Suffered in the Service of the United Nations* (n 64) 178.

concluded that the UN had international legal personality, albeit limited to the extent that its functions required it. The foundation for the UN possessing international legal personality was, in part, due to its Members:

It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.⁶⁷

The Court stressed that, in conferring legal personality, it had not equated the UN with the equivalent standing of a state:

the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State.⁶⁸

The Court's consideration of international legal personality evidences that state conduct may result in international legal personality being conferred upon non-state entities. The lack of express provisions in the UN Charter did not preclude the ICJ from finding that states, by their conduct, had transferred rights to the UN as an international organisation. Therefore, state conduct may provide an additional route by which foreign investors can be attributed with rights and duties in public international law. The significance of conferring non-state actors with international legal personality for the establishment of a host state human rights defence is considered in Chapter 5 of this thesis.

In summary, a positivist conception of public international law requires that states endow non-state actors with international legal personality, either expressly or impliedly. While this approach emphasises the role of the state within public international law at the expense of the individual, it provides a secure grounding for a host state human rights defence. A strong foundation provides a host state human rights defence with the greatest chance of being accepted and implemented in ICSID arbitration.

Having determined the wider theoretical basis that underlies the formation of public international law for the purposes of this thesis, it is necessary to consider how public international law functions within this philosophy. By examining the

⁶⁷ Ibid 179.

⁶⁸ Ibid.

manner in which public international law functions, and in particular its systemic nature, content can be given to the notion of ‘fragmentation’ as it is utilised in this thesis.

2.4 PUBLIC INTERNATIONAL LAW AS A ‘SYSTEM’

To determine how a host state human rights defence might ‘de-fragment’ international investment law and international human rights law, the process of the ‘fragmentation’ of public international law needs to be understood. The use of terminology such as ‘unity’ and ‘cohesion’, and conversely, ‘fragmentation’ and ‘diversification’ in relation to public international law implies that public international law operates in a systemic manner.⁶⁹ Given this inference, it is necessary to discuss differing perceptions of how public international operates to determine whether it can function systemically.

The jurisprudential hallmarks of a ‘legal system’ are primarily drawn from the structure and operation of municipal legal systems.⁷⁰ Yet, public international law exhibits characteristics that distinguish it from domestic legal systems. These qualities include that legal relationships primarily exist between states,⁷¹ there is notional equality of states (and as a consequence, a lack of centralised authority)⁷² and that states create the law by consent driven methods whilst simultaneously being the subjects of public international law.⁷³ It has been argued that these traits preclude public international law from functioning as a coherent legal system.⁷⁴ Relying on

⁶⁹ B Simma, 'Fragmentation in a Positive Light' (2004) 25 Michigan Journal of International Law 845, 847.

⁷⁰ W Twining, 'General Jurisprudence' (2007) 15 University of Miami International and Comparative Law Review 1, 9.

⁷¹ V Lowe, *International Law* (Oxford University Press 2007) 5; Shaw (n 2) 5.

⁷² M Craven, 'Unity, Diversity and Fragmentation of International Law' (2003) 14 The Finnish Yearbook of International Law 3; Shaw (n 2) 6; C Tomuschat, 'International Law as a Coherent System: Unity or Fragmentation?' in MJ Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 330, 332.

⁷³ P Weil, 'Towards Relative Normativity in International Law' (1983) 77 The American Journal of International Law 413, 420; Shaw (n 2) 6.

⁷⁴ Early theorists, such as Austin and Bentham, required a legal system to evidence, amongst other things, a sovereign power and coercive sanctions (see AJ Sebok, 'Misunderstanding Positivism' (1995) 93 Michigan Law Review 2054, 2063 - 5; D Armstrong, T Farrell and H Lambert, *International Law and International Relations* (Cambridge University Press 2007) 75). Neither of these elements are considered to be present within public international law (O Casanovas, *Unity and Pluralism in Public International Law* (Martinus Nijhoff 2001) 6. Regarding sovereign power see Lowe (n 71) 6 - 7).

this proposition, public international law has been deemed by some⁷⁵ to consist of separate, but overlapping, self-sustaining regimes.⁷⁶ The primacy given to the purposes and characteristics of each regime⁷⁷ consequently renders a discussion regarding the unity and fragmentation of public international law as a systemic whole redundant.

In contrast to this approach, public international law can also be portrayed as evidencing characteristics that support a systemic viewpoint. The basis of this position is summarised in the conclusions of the Study Group of the International Law Commission (ILC) on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law which declare at the outset that:

International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms.⁷⁸

This thesis is premised on a systemic conception of public international law. This view of public international law is drawn from its reliance on general principles and secondary norms that have the potential be applied in a unified manner to all

⁷⁵ This view is predominantly taken by international relations scholars.

⁷⁶ For example, see J Goldsmith and E Posner, 'A Theory of Customary International Law' (1999) 66 University of Chicago Law Review 1113; G Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 849; A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999, who argue that there is no unity in public international law as it is a 'legal reproduction of collisions between the diverse rationalities within global society' (at 1017); C Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 New York University Journal of International Law and Politics 259; HG Cohen, 'From International Law to International Conflicts of Law: The Fragmentation of Legitimacy' (2010) 104 American Society of International Law Proceedings 49.

⁷⁷ B Simma and D Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 504.

⁷⁸ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 and UN Doc A/CN.4/L.682/Add.1 at [1]. See also *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea) (Judgment) 2012 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=7a&case=103&code=gc&p3=4> accessed 7 July 2013, Declaration of Judge Greenwood [8] where he stated '[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law'.

substantive areas of public international law.⁷⁹ Accordingly, these general principles and secondary norms form part of the wider body of public international law in which specialist regimes operate,⁸⁰ and hence, provide it with a common underpinning.

General principles of public international law can be considered to be those principles that are binding on all members of the international legal system,⁸¹ and as such, have universal application.⁸² Examples of general principles of public international law include the rules of state responsibility as codified by the ILC⁸³ and the rules of treaty interpretation as set out in the Vienna Convention on the Law of Treaties (VCLT)⁸⁴ that have become customary principles. General principles can be juxtaposed with *inter partes* principles entered into between specific participants of the legal system and which only have binding legal effect on those participants.⁸⁵ As a result, despite the increasing specialisation of substantive norms (and the establishment of particular regimes to administer these norms) through the development of *inter partes* principles, general principles of public international law continue to apply across all fields of public international law, by default, to the extent that they are not specifically excluded.⁸⁶ Consequently, subordinate reliance on general principles of public international law gives credence to the proposition that public international law operates in a systemic fashion.⁸⁷

⁷⁹ A similar position is taken by A Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: United Terminology of a Fragmented System' (2011) 22 *European Journal of International Law* 993.

⁸⁰ J Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 *Michigan Journal of International Law* 903, 906.

⁸¹ Casanovas (n 74) 56. For a full discussion of the potential conceptions of this term, including its relationship to general principles of international law as set out in Article 38 of the Statute of the International Court of Justice, see Gourgourinis (n 79) 1004 – 1016.

⁸² Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (n 77) 500 fn 83.

⁸³ Set out in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002). See Pauwelyn (n 80) 906; Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (n 77) 500.

⁸⁴ VCLT (n 27). See Pauwelyn (n 80) 906.

⁸⁵ Casanovas (n 74) 56; Gourgourinis (n 79) 1010 – 1011.

⁸⁶ Simma, 'Fragmentation in a Positive Light' (n 69) 847; Pauwelyn (n 80) 906; Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (n 77) 500; JD Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative and International Law* 77, 145.

⁸⁷ Pauwelyn (n 80) 906.

A further dichotomy may be drawn between primary and secondary rules. Unlike *inter partes* and general principles of international law, which are distinguished by their respective *scope* of application, the differentiation between primary and secondary norms focuses on the *function* of the norms.⁸⁸ This distinction is often (but not always) drawn from HLA Hart's treatise *The Concept of Law*.⁸⁹ Hart posits that primary norms are those that regulate the conduct of those subject to the law, whilst secondary norms provide a supporting legal basis for the operation of these rules (and can be considered to be rules governing the adjudication of disputes, amendments to primary rules and the recognition of sources of binding law).⁹⁰ In the context of international investment law, examples of primary norms would be rules governing host state conduct towards foreign investors that are contained in IIAs. Secondary norms would include rules determining the validity of the IIA as a source of binding law, rules governing its interpretation and rules setting out the consequences of breaching the terms of the IIA. In this sense, secondary norms function in a similar manner to general principles of international law. They operate as a unifying framework (to the extent that they are not specifically excluded) by dictating the manner in which all primary norms are to perform. Thus, they give rise to an underlying system within public international law.⁹¹

Hart does not recognise that public international law possesses the necessary hallmarks of a system of law.⁹² This is partly due to its lack of secondary rules⁹³ when compared to municipal legal systems.⁹⁴ Nevertheless, this thesis proceeds on

⁸⁸ Gourgourinis (n 79) 994 – 995.

⁸⁹ H Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994). It is not clear if the ILC developed the rules of state responsibility in light of Hart's theory or independently (See Crawford (n 83) 14). For discussion regarding the manner in which the ILC Rapporteurs approached the distinction between primary and secondary norms see Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (n 77) 493 – 494; Gourgourinis (n 79) 1016 – 1020.

⁹⁰ Hart (n 89) 94 - 97. See also Casanovas (n 74) 16. With regard to their application, see especially *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 41.

⁹¹ Prost argues that the use of Hart's theory of primary and secondary norms of itself is insufficient to establish that public international law is a legal system (M Prost, *The Concept of Unity in Public International Law* (Hart Publishing 2012) 83 – 125). This work does not seek to utilise Hart's argument in this manner. It merely seeks to identify an underlying unity within public international law that goes beyond the conception that public international law merely consists of independent, self sustaining regimes.

⁹² Hart (n 89) Chapter 10.

⁹³ Ibid 230 – 231.

⁹⁴ Ibid 216.

the basis that public international law shares sufficient unifying characteristics to operate in a systemic manner. Whilst public international law may not share all of the same characteristics as municipal legal systems, and as such may not amount to a 'legal system' by reference to jurisprudential standards,⁹⁵ general principles of international law and secondary norms evidence a clear structural basis.⁹⁶ The ILC's conception of public international law as a system is driven by a minimalist view of what amounts to a legal system, that is, a non-random collection of rules and principles. Despite the informal nature of this proposed structure, it should not be discredited. It is submitted that this conceptualisation is sufficient to give rise to public international law being understood as operating in a systemic manner.

2.4.1 'Unity' and 'Fragmentation'

The recognition of the systemic nature of public international law is inadequate to fully consider its cohesiveness. This requires consideration regarding the extent to which public international law evidences 'unity' or 'fragmentation'. The notions of 'unity' and 'fragmentation' are both relative to the degree of coherence evident in the selected construct of public international law.⁹⁷ Even when their particular context is established, the terms 'unity' and 'fragmentation' can be broadly construed and both phenomena can operate to varying degrees.⁹⁸ Hence, before evaluating the degree of interaction between international investment law and international human rights law by reference to the extent to which they evidence 'fragmentation', it is necessary to define these terms.

It may seem counterintuitive when considering 'fragmentation' to commence with a definition of 'unity'. However, when considering 'fragmentation', the unity or coherence of public international law is often presumed.⁹⁹ The term 'fragmentation'

⁹⁵ Weil (n 73) 413; J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal of International Law* 874, 880.

⁹⁶ Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (n 95) 880.

⁹⁷ M Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation' (2006) 17 *The Finnish Yearbook of International Law* 131, 131 – 132, 149; IH Scheltema, 'The Fragmentation of International Law: Framing the Debate' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1581425> accessed 19 June 2012, 16.

⁹⁸ Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation' (n 97) 131, 149.

⁹⁹ PS Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' (2004) 25 *Michigan Journal of International Law* 929, 930; Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation'

itself infers that what was once a whole is now broken.¹⁰⁰ Discussion regarding the manner in which law is ‘fragmented’ reiterates this presumption.¹⁰¹ Therefore, when using ‘fragmentation’ as a benchmark, it is necessary to refer to the understanding of ‘unity’ against which it is measured.¹⁰² This is especially so when both terms have the potential to be applied in a variety of manners. Thus, for these reasons, prior to defining ‘fragmentation’, ‘unity’ must be defined.

2.4.1.1 Unity

Unity within public international law may be defined by reference to several factors.¹⁰³ For the purposes of this thesis, the term ‘unity’ will be used to refer to substantive unity, that is, unity that prevents conflict between substantive norms¹⁰⁴ of public international law.¹⁰⁵ It is accepted that conflicts between substantive norms

(n 98) 134; B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265, 267; Gourgourinis (n 79) 995 – 996; S Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 *Leiden Journal of International Law* 23, 31.

¹⁰⁰ T Treves, 'Fragmentation of International Law: the Judicial Perspective' (2007) 23 *Comunicazioni e Studi* 821, 821; Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 99) 270, A-C Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *Leiden Journal of International Law* 1, 5; Tomuschat (n 72) 323 – 324; A Bjorkland and S Nappert, 'Beyond Fragmentation' in T Weiler and F Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Walde* (Martinus Nijhoff Publishers 2011) 440. However, it has been contended that the ‘fragmentation’ of public international law ‘did not arise out of some intrinsic weakness’ of public international law but rather, resulted from the ‘unprecedented normative and institutional expansion’ of public international law (M Prost and PK Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organisations Really Matter?' (2006) 5 *Chinese Journal of International Law* 341, 343).

¹⁰¹ Gourgourinis (n 79) 994.

¹⁰² Scheltema, (accessed 19 June 2012) (n 97) 16; Prost, *The Concept of Unity in Public International Law* (n 91) 14 – 15.

¹⁰³ See Prost, *The Concept of Unity in Public International Law* (n 91). Prost identifies six forms of unifying characteristics within public international law, evidencing the multiplicity of ways in which the term may be used. The six forms of unity identified are material unity (the absence of conflict between positive obligations), formal unity (the universal acceptance and consistency of secondary rules), corporate unity (international law as a professional field), grammatical unity (international law as a discursive field), ontological unity (unity through a common postulate or principle of interpretation) and axiological unity (unity through shared over-arching values). Reference has previously been made to the common origins of international investment law and international human rights law as a means of substantiating claims of similarity between these particular regimes. See P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); TG Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence' (2011) 12 *Journal of World Investment and Trade* 27.

¹⁰⁴ '[T]wo norms are ... in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other' (J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law* (Cambridge University Press 2003) 175- 176).

¹⁰⁵ Prost, *The Concept of Unity in Public International Law* (n 91) 48.

of public international law may arise. Nevertheless, in a unified conception of public international law, any such conflicts would be avoidable.

In adopting this interpretation, ‘unity’ reflects that public international law is framed around general principles and secondary norms. The inclusion of general principles and secondary norms is implicit to this conception of ‘unity’ as it is general principles and secondary norms that provide the basis for the source of primary norms, their interpretation and determine the consequences of any breaches. These are all relevant considerations when examining how best to resolve norm conflict in public international law.

For example, one manner in which secondary norms may resolve norm conflict is by reference to the notion of systemic integration. Systemic integration draws upon the language of the secondary norms set out in Article 31(3)(c) of the VCLT to posit that, when interpreting a treaty, the relationship of the treaty with other principles of public international law, and the position of the treaty within the international legal framework should be taken into account.¹⁰⁶ Article 31(3)(c) VCLT makes it clear that it is mandatory for the treaty interpreter to take into account ‘any relevant rules of international law applicable in the relations between the parties’. This prevents the interpreter of the treaty from taking an isolated view of the law because ‘the normative environment cannot be ignored and ... the principle of integration should be borne in mind’.¹⁰⁷ Through the use of a secondary norm, systemic integration demonstrates how it is possible to achieve substantive unity within the formulation of public international law adopted in this thesis.

2.4.1.2 Fragmentation

The relative nature of fragmentation results in its definition being contingent on the proposed form of unity.¹⁰⁸ Accordingly, there is a considerable degree of variability

¹⁰⁶ C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279; VP Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? - Between Evolution and Systemic Integration' (2010) 31 *Michigan Journal of International Law* 621, 632. See J Kammerhofer, 'Systemic Integration, Legal Theory and the ILC' (2010) 19 *Finnish Yearbook of International Law* 2008 157.

¹⁰⁷ ILC (n 78) 211.

¹⁰⁸ Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation' (n 97) 132.

in what is perceived to amount to fragmentation and its potential consequences.¹⁰⁹ Given that the focus of this thesis is on the substantive unity of norms, fragmentation in this setting refers to the process by which individual areas of public international law are becoming increasingly specialised and divided, that legal principles are becoming incoherent, and, as a consequence, public international law is losing general applicability and, simultaneously, its cohesiveness.¹¹⁰

In part, the process of fragmentation has resulted from the development of specialised subsystems within the public international law framework (*leges speciales*).¹¹¹ These are typically characterised by treaty-based regimes that provide for legal obligations that vary from the principles of general international law.¹¹² When varying general international law, the parties may deviate from general principles by altering the secondary rules,¹¹³ or both the primary and secondary rules that would usually apply.¹¹⁴ The phrase *lex specialis* may also be used to refer to specialist regimes in public international law more generally.¹¹⁵ In this thesis, unless otherwise stated, *lex specialis* refers to the form of specialisation involving variations in both primary and secondary norms.

The extent to which *leges speciales* may deviate from general international law to form a ‘self-contained regime’ has been the subject of much debate.¹¹⁶

¹⁰⁹ Ibid 133. Prost identifies three broad schools of thought regarding the effects fragmentation including those who view fragmentation as a threat, those that consider the dangers to be overstated and those that see fragmentation as positive (ibid 133).

¹¹⁰ ILC (n 78) 11; Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 99) 270; Martineau (n 100) 4; Singh (n 99) 24 – 25; E Guntrip, 'Systemic Integration and International Investment Law' in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law Volume 3 2010* (Hart Publishing 2012) 258.

¹¹¹ Rao (n 99) 933 – 934; McLachlan (n 106) 284; Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 99) 270; D Lapaš, 'Some Remarks on Fragmentation of International Law: disintegration or transformation?' (2007) 40 *The Comparative and International Law Journal of Southern Africa* 1, 2; Guntrip (n 110) 258.

¹¹² Casanovas (n 74) 56; ILC (n 78) 91; Guntrip (n 110) 258.

¹¹³ ILC (n 78) 68; A Khrebtukova, 'A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation' (2008) 4 *International Law and International Relations* 51, 54. See *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (n 90) 3 c.f. *S.S. Wimbledon* PCIJ Rep Series A No 1 which focused on specialised primary rules.

¹¹⁴ ILC (n 78) 68; Khrebtukova (n 113) 54; Guntrip (n 110) 258.

¹¹⁵ ILC (n 78) 68; Treves (n 100) 826. This is achieved by classifying the subsystems by reference to the subject matter that they regulate (such as international investment law, international human rights law and international environmental law).

¹¹⁶ This is evidenced by the varied approaches taken by the ILC: 'The International Law Commission's stand with regard to the existence of so-called self-contained regimes concerning state responsibility has varied with each special rapporteur taking up the subject of legal consequences of internationally wrongful acts. In a nutshell, the ILC first appeared to embrace the concept of self-contained subsystems (Riphagen), then became highly critical of the systematic feasibility of such

Academic commentators have contended that treaty based regimes may act independently from public international law by excluding the applicability of all general secondary norms, and in particular, state responsibility¹¹⁷ (forming the basis of arguments countering the systemic nature of public international law).¹¹⁸ However, consistent with the systemic attributes of public international law forming the foundation of this thesis, it is argued that a true ‘self-contained regime’ is not possible.¹¹⁹ Both general principles and secondary norms of public international law will still be utilised by these regimes (albeit to a limited degree).¹²⁰ Treaty interpretation provides a good example of how this might operate.¹²¹ A treaty establishing a ‘self-contained regime’ may set out the manner in which it should be interpreted, including definitions of key provisions. Nonetheless, should, for example, a definition be ambiguous, the VCLT, either as a treaty or customary international law may be applied to resolve the ambiguity. In short, should the specialist attributes of the subsystems fail, then general principles and secondary norms will apply in their absence.¹²² Consequently, the term ‘fragmentation’ refers to the increasing independence exhibited by *lex specialis* regimes, but does not extend to their complete isolation from public international law in all respects.¹²³

2.4.2 Diversity and Regime Conflict

The distinction between unity and fragmentation outlined above, when applied to a systemic understanding of public international law, becomes less definite and more dynamic. This is due to the systemic nature of public international law being

isolation from state responsibility (Arangio-Ruiz), and finally adopted the position of a pragmatic ‘maybe’ (Crawford)’ (Simma and Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (n 77) 493).

¹¹⁷ Casanovas (n 74) 62 - 63; ILC (n 78) 66; Simma and Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (n 77) 492 – 493; Lapaš (n 111) 5; Gourgourinis (n 79) 1020.

¹¹⁸ Casanovas (n 74) 211.

¹¹⁹ See Treves (n 100) 832 – 833.

¹²⁰ B Simma, ‘Self-Contained Regimes’ (1985) 16 Netherlands Yearbook of International Law 111, 117; Simma and Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (n 77) 485; Khrebtukova (n 113) 63.

¹²¹ See Fry (n 86) 129; Guntrip (n 110) 259.

¹²² Simma, ‘Self-Contained Regimes’ (n 120) 136; ILC (n 78) 73; Simma, ‘Fragmentation in a Positive Light’ (n 69) 847.

¹²³ G Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 New York University Journal of International Law and Politics 919, 926; Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (n 95) 880; Simma and Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (n 77) 492; Khrebtukova (n 113) 63 - 64.

contingent on both unity and fragmentation simultaneously. The conception of public international law as a system presupposes a certain degree of diversity between *lex specialis* regimes.¹²⁴ Without this diversity of *lex specialis* regimes, a system is not required to unify the regimes.¹²⁵ Conversely, the degree to which divergence is permitted must be curtailed so as to ensure a requisite degree of uniformity to justify public international law being classified as a system.¹²⁶ Without sufficient unity, public international law becomes fragmented. As a result, a balance must be struck between diversity and unity that enables variation between *lex specialis* regimes of public international law whilst preventing its fragmentation.

Fragmentation may result from the increasing diversity and independence of *lex specialis* regimes. Too much diversity and independence can limit the extent to which legal regimes within public international law interact because each regime will tend to exhibit structural bias in favour of the subject matter that it regulates.¹²⁷ This precludes instruments setting out substantive norms and dispute resolution mechanisms from referring to principles from other *lex specialis* regimes that may apply to a given situation.¹²⁸ Even if principles from other regimes are taken into account, dispute resolution mechanisms are structurally unable to adequately address all of the substantive law that may apply to the dispute at hand.¹²⁹ Thus, each specialised form of dispute resolution can only fully consider and resolve a dispute by favouring the application of the provisions set out in the treaties establishing the regime of which it forms part.¹³⁰ Hence, similar disputes that traverse several *lex specialis* regimes may result in differing outcomes depending on which dispute resolution forum is selected. This degree of specialism, both in relation to content and dispute resolution, undermines the cohesiveness of public international law as a system, which contributes to its fragmentation. In turn, it results in an increased

¹²⁴ Craven (n 72) 12.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Leathley (n 76) 265; M Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *The Modern Law Review* 1, 4; Khrebtukova (n 113) 56; A van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal' (2009) 16 *Indiana Journal of Global Legal Studies* 483, 484.

¹²⁸ These characteristics have been described as 'norm fragmentation' and 'authority fragmentation'. See T Broude, 'Principles of Normative Integration and the Allocation of International Authority: the WTO, the Vienna Convention on the Law of Treaties and the Rio Declaration' (2009) *Loyola University of Chicago International Law Review* 173

¹²⁹ Khrebtukova (n 113) 56; Broude (n 128) 179.

¹³⁰ Khrebtukova (n 113) 56.

likelihood of conflict between legal regimes when two or more fields of specialist public international law apply to a particular scenario.¹³¹ Accordingly, should *lex specialis* regimes exhibit too much diversity, the cohesiveness of public international law may be reduced, increasing the likelihood of fragmentation, and with it, regime conflict.

The term ‘de-fragmentation’, as it is used in this thesis, refers to the prevention of regime conflict in the manner described above. It is submitted that the establishment of a host state human rights defence can achieve the aim of minimising regime conflict between international investment law and international human rights law. However, in order to achieve this aim, the defence must take into account the specialist nature of ICSID arbitration and consider the impact of any attributes displayed by ICSID arbitration that may favour the application of international investment law, and hinder the introduction of international human rights law. These factors are fully considered in Part B of this thesis.

2.5 CONCLUSION

The introduction of a host state human rights defence within ICSID arbitration requires a theoretical basis that does not render it open to unnecessary criticism. By adopting a positivist stance in relation to public international law, it is possible to formulate a widely accepted and justifiable defence. The nature of this jurisprudential basis restricts international legal personality to states, apart from those instances where states have consented to the conferral of rights upon individuals. Although this may be perceived as a conservative understanding of public international law, it reinforces the strong foundation required for a widely accepted host state human rights defence. Throughout this thesis these bases will inform the potential foundations for, and application of, the proposed defence.

The operation of the defence is based on a systemic viewpoint of public international law. This position is adopted based on the unifying features of general principles and secondary norms of public international law. These, in turn, inform the definition of the concepts of ‘unity’ and ‘fragmentation’, which further evidence the cohesive nature of public international law. The potential operation of a host

¹³¹ Lapaš (n 111) 2; Tomuschat (n 72) 336.

state human rights defence will be considered by reference to these concepts. Particular emphasis will be placed on how fragmentation, resulting from the diversity and independence of *lex specialis* regimes, may result in regime conflict if taken too far. This occurs when *lex specialis* regimes are structurally unable to consider principles sourced from other regimes. Focus will be placed on the ability of the host state human rights defence to reverse this process, by ‘de-fragmenting’ international investment law and international human rights law. Prior to the ‘de-fragmentation’ stage of this process, the next chapter considers the extent to which international investment law evidences this form of regime conflict, and highlights the attributes required by a host state human rights defence in ICSID arbitration so as to remedy some of the problems that arise as a result of the fragmentation of international investment law and international human rights law.

3. REGIME CONFLICT AS JUSTIFICATION FOR A HOST STATE HUMAN RIGHTS DEFENCE IN ICSID ARBITRATION

3.1 INTRODUCTION

The fragmentation of public international law into *leges speciales* increases the likelihood of regime conflict.¹ The creation of specialised legal regimes, with differing aims and diverse approaches to dispute resolution, has the potential to jeopardise the ability of public international law to provide a common solution to a single problem.² The intersection of international investment law and international human rights law illustrates the risk of conflict at several levels of analysis.

At its broadest conception, international investment law and international human rights law are two specialised regimes that, whilst sharing common elements drawn from general principles of public international law, seek to achieve differing aims. As a result, each regime focuses on substantive norms that promote their singular objectives. The danger that accompanies such an approach is that each regime is unable to adequately address scenarios that extend beyond its own aims.

The hypothetical nature of this regime conflict becomes tangible when states seek to comply with both regimes simultaneously. Given the failure of each regime to consider consequences extending beyond its own substantive norms, a state, when acting in compliance with one regime, may be unable to comply with obligations set out in the other.³ This results in a conflict of norms.⁴ For example, an investment project that is causing human rights violations may require a host state to act in breach of the terms of an IIA so as to comply with its international obligations to prevent human rights violations.

¹ See Chapter 2, section 2.4.2.

² T Treves, 'Fragmentation of International Law: the Judicial Perspective' (2007) 23 *Comunicazioni e Studi* 821, 827.

³ D Lapaš, 'Some Remarks on Fragmentation of International Law: disintegration or transformation?' (2007) 40 *The Comparative and International Law Journal of Southern Africa* 1, 2; C Tomuschat, 'International Law as a Coherent System: Unity or Fragmentation?' in MJ Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 336.

⁴ '[T]wo norms are ... in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other' (J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law* (Cambridge University Press 2003) 175- 176).

Finally, in the specific framework of dispute resolution, the limited mandate of each dispute resolution forum is likely to preclude the introduction of principles and concepts external to those set out in the treaties establishing the regime.⁵ This is demonstrated by ICSID arbitration, which provides for procedural mechanisms that are designed to support the international investment law regime, but may create hurdles that prevent the full introduction of international human rights law. Regime conflict at each of these levels can undermine the unity of public international law, unless mechanisms are available to resolve these conflicts.

This chapter endeavours to identify, and evaluate, the conflict encountered when attempting to introduce international human rights law into the international investment law regime at each of these levels of analysis. By undertaking this appraisal, both the degree of interaction between these regimes and the barriers that may hinder their cohesiveness can be understood. Most importantly, based on this understanding, it is possible to establish a foundation from which to formulate a workable solution. In light of this aim, this chapter seeks to justify the introduction of, and determine the best structure for, a host state human rights defence in ICSID arbitration proceedings as a means of uniting international investment law and international human rights law.

To achieve this outcome, the chapter initially outlines the manner in which international investment law and international human rights law interrelate within IIAs, given that IIAs form the legal basis for most ICSID arbitrations. This section considers the current extent to which IIAs evidence the unity (or fragmentation) of the two regimes to assess whether an express term permitting a host state human rights defence could be inserted into IIAs. Having considered the legal instruments that form the foundations of ICSID arbitrations, the focus of the chapter then turns to the manner in which ICSID arbitral tribunals have addressed human rights arguments raised by the respondent host state. By considering a selection of arbitral awards that have considered human rights based host state arguments, it is possible to identify broader trends in both host state and arbitral practice that preclude international human rights law from being fully considered by ICSID arbitral

⁵ T Broude, 'Principles of Normative Integration and the Allocation of International Authority: the WTO, the Vienna Convention on the Law of Treaties and the Rio Declaration' (2009) *Loyola University of Chicago International Law Review* 173, 179.

tribunals. Discussion then focuses on the purpose and scope of the ICSID Arbitral Rules that permit *amicus curiae* submissions, which is the key procedure that currently permits human rights considerations to be raised in ICSID arbitration proceedings by non-disputing parties. The ability of these procedures to introduce international human rights law into ICSID arbitration is examined. Based on the preceding analysis, and by way of conclusion, the chapter seeks to justify that a host state human rights defence provides the necessary link to unify international investment law and international human rights law in ICSID arbitration whilst simultaneously setting out the proposed attributes of a host state human rights defence.

3.2 THE INTERACTION BETWEEN INTERNATIONAL INVESTMENT LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN IIAs

IIAs provide the legal foundations for the *lex specialis* nature of international investment law by varying the terms of general public international law that would govern FDI, and by establishing specialist dispute resolution mechanisms including ICSID arbitration. Should IIAs be fragmented by showing a singular focus on international investment law, it is unlikely that ICSID arbitration will be able to adequately address concerns raised within the international human rights law regime, resulting in host states potentially breaching international human rights law in order to comply with the terms of the IIA. This is one type of regime conflict that a host state human rights defence seeks to avoid.

A potential means of introducing a host state human rights defence is to include an express provision within IIAs permitting host states to rely on international human rights law to justify a breach of the IIA. An analysis of the current interaction of these regimes within IIAs can assist in determining whether a ‘host state human rights defence’ clause is a possibility. Having established the definitions of ‘public international law’, ‘unity’ and ‘fragmentation’ in Chapter 2, it is possible to use these notions to assess the degree to which international investment law and international human rights law interact within IIAs. Should there be a tendency of IIAs to exhibit characteristics associated with ‘unity’, this increases the chances of an express provision setting out a host state human rights defence being successfully introduced into IIAs.

Therefore, to consider the option of an express host state human rights defence provision in IIAs, this section will examine the terms of selected Model BITs that address international human rights law,⁶ to evaluate the extent to which the provisions used evidence the unity (or fragmentation) of international investment law and international human rights law. The implications for a host state human rights defence are considered in light of the analysis of each Model BIT. Finally, the reasons for the current degree of unity or fragmentation are discussed, before initial conclusions are drawn.

3.2.1 Human Rights Provisions in BITs

The focus of the analysis in this section is centred on selected Model BITs. This is for two reasons. First, BITs are investment protection instruments that primarily deal with investment. In contrast, Free Trade Agreements (FTAs), whilst often having an investment chapter, primarily address broader trade related issues. Consequently, BITs most accurately reflect state practice with regard to investment protection. Therefore, whilst two FTAs refer to international human rights law in their preambles,⁷ this is not necessarily indicative of the specific relationship between international human rights law and international investment law. An exception is made in relation to the North American Free Trade Agreement⁸ (NAFTA), given that it initiated the introduction of provisions addressing interests external to the international investment law regime in IIAs. Second, Model BITs exemplify the ideals of negotiating states. Model BITs therefore clearly evidence a state's investment policy. The selection of Model BITs has been based on states whose Model BITs are particularly influential, or those states that have taken strong policy positions on international human rights law.

⁶ Further examples are discussed in UNCTAD, *Bilateral Investment Treaties 1995 - 2006: Trends in Investment Rulemaking* (United Nations 2007) 94 – 99.

⁷ Free Trade Agreement (European Free Trade Association and Singapore) (adopted 26 June 2003, entered into force 1 January 2003) <<http://www.efta.int/free-trade/free-trade-agreements/singapore.aspx>> accessed 11 July 2013 (EFTA/Singapore FTA) states in the preamble 'REAFFIRMING their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights'. The Free Trade Agreement (Canada-Colombia) (adopted 21 November 2008, entered into force 15 August 2011) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx>> accessed 11 July 2013 (Canada/Colombia FTA) states in the preamble 'AFFIRMING their commitment to respect the values and principles of democracy and promotion and protection of human rights and fundamental freedoms as proclaimed in the *Universal Declaration of Human Rights*'.

⁸ North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) 32 ILM 289, 605.

Prior to the negotiation of NAFTA, IIAs were silent with regard to the relationship between international human rights law and international investment law. However, due to lobbying from non-governmental organisations (NGOs) during its concluding stages,⁹ NAFTA entered into force in 1994 with two side agreements, which specifically addressed environmental and labour standards respectively.¹⁰ Additionally, the main text of NAFTA included Article 1114(2) precluding the relaxation of environmental measures as a means of attracting FDI. Following NAFTA, the practice of referring to labour standards and environmental standards has been replicated in subsequent BIT practice.

Given their focus on environmental and labour standards, NAFTA, and subsequent BITs including similar terms, do not directly evince reliance on human rights obligations. Nonetheless, significant linkages exist between labour standards and human rights obligations and environmental standards and human rights obligations. International human rights instruments provide general statements of principle that closely reflect the 'core labour standards' set out in International Labour Organization (ILO) Conventions.¹¹ Further, a strong correlation exists

⁹ E Guntrip, 'Labour Standards, the Environment and US Model BIT Practice: Where to Next?' (2011) 12 *Journal of World Investment and Trade* 101, 104 – 106. See R Housman and P Orbuch, 'Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead' (1993) 8 *American University Journal of International Law and Policy* 719; R Housman, 'The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts' (1994-1995) 10 *Connecticut Journal of International Law* 301.

¹⁰ North American Agreement on Environmental Cooperation (adopted 14 September 1993, entered into force 1 January 1994) 32 ILM 1480 and the North American Agreement on Labor Cooperation (adopted 14 September 1993, entered into force 1 January 1994) 32 ILM 1499. See Housman, 'The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts' (n 9) 306; D Vogel, 'The Environment and International Trade' in O Graham Jr. (ed), *Environmental Politics and Policy: 1960s-1990s* (Pennsylvania State University Press 2000), 88-89; JJ Schott, 'Free Trade Agreements: Boon or Bane of the World Trading System?' in JJ Schott (ed), *Free Trade Agreements: US Strategies and Priorities* (Institute for International Economics 2004) 41.

¹¹ Freedom of association and collective bargaining are addressed by the International Labour Organization (ILO) in the Freedom of Association and Protection of the Right to Organise Convention (adopted 9 July 1948, entered into force 4 July 1950) 68 UNTS 17 (ILO Convention No. 87) and the Right to Organize and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951) 96 UNTS 257 (ILO Convention No. 98). Similar rights are set out in the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 in Articles 6 to 9. Article 22 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 provides for freedom of association, including the right to join a trade union. Provisions regarding freedom of association and collective bargaining are also found in the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) and regional instruments including the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

between substantive environmental obligations and human rights obligations such as the right to life, the right to health, the rights to a private and family life, property rights and indigenous and minority rights.¹² In light of these connections, wider

The ILO provides for freedom from forced labour in the Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55 (ILO Convention No. 29) and in the Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291 (ILO Convention No. 105). Similar concepts are contained in Article 4 of the UDHR (which prohibits slavery) and Article 8 of the ICCPR (which forbids slavery and forced or compulsory labour). Both slavery and forced or compulsory labour are to be progressively abolished in accordance with the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3.

The prohibition on child labour is governed by the ILO in its Convention concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (ILO Convention No. 138) and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 (ILO Convention No. 182). The prohibition on the economic exploitation of children is also addressed in Article 10(3) of the ICESCR and Article 32(1) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

In relation to non-discrimination, the ILO has adopted the Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953) 165 UNTS 303 (ILO Convention No. 100) and the Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31 (ILO Convention No. 111). Non-discrimination provisions in relation to employment are also set out in Article 23 of the UDHR, Article 5(e)(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 and Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

See generally K Ewing, C Gearty and B Hepple (eds), *Human Rights and Labour Law* (Mansell Publishing Limited 1994); L Swepston, 'The International Labour Organization's System of Human Rights Protection' in J Symondies (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate/UNESCO 2003); P Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005).

¹² The right to life and the right to health are contained in many human rights instruments. The right to life is contained in, amongst other provisions, Article 3 of the UDHR (n 11) and Article 6 of the ICCPR (n 11). Article 11 of the ICESCR (n 11) provides that everyone should have an adequate standard of living, including the right to food, clothing and housing. The right to health is set out in Article 25 of the UDHR (n 11), Article 12 of ICESCR (n 11) and is also contained in Article 24 of the CRC (n 11) and in UNGA Res 45/94 (14 December 1990) UN Doc A/RES/45/94. The link between the environment and the right to life and the right to health was initially set out in the Declaration of the United Nations Conference on the Human Environment (concluded 16 June 1972) UN Doc A/Conf.48/14/Rev. 1 (1973) (Stockholm Declaration) in both the Preamble and Principle 1. The Rio Declaration on Environment and Development (concluded 13 June 1992) UN Doc. A/CONF.151/26 (vol. I) (Rio Declaration) subsequently linked the concept of sustainable development to the right to health. The relationship between the rights to life and health and the environment has subsequently been addressed by the International Court of Justice in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 and in Judge Weeramentry's separate opinion in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

The right to a private and family life are contained in Article 8 of the ECHR (n 11). This provision has been used to argue that environmental pollution infringes the right to a family and home life. In the case of *López-Ostra v. Spain* (1994) Series A no 303C, the European Court of Human Rights

references in IIAs to labour standards and environmental law in the discussion below will be taken to be representative of international human rights law standards more generally.

The inclusion of environmental and labour standards in NAFTA initially influenced the terms of the model BITs of NAFTA states, particularly Canada and the USA, to ensure consistency across their FDI programmes.¹³ Therefore, the manner in which these Model BITs have integrated international environmental law and international labour standards into their provisions is instructive for analysing the prospects of including a provision in IIAs allowing for a host state human rights defence.

The 2003 Canadian Model Foreign Investment Promotion and Protection Agreement¹⁴ (2003 Canadian Model FIPA) provides, in Article 11, in rather weak terms, that states 'should not' offer to waive, actually waive or otherwise derogate from environmental measures to encourage FDI. Article 11 adopts a similar format

found that severe environmental pollution may affect the well being of individuals preventing them from enjoying their home and family life.

The right to property is contained in Article 17 UDHR (n 11) and in Article 21 of the American Convention on Human Rights American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 144 UNTS 123 (ACHR). Environmentally destructive activities on indigenous peoples' land may violate their right to property. It may also be considered to be a breach of Article 27 of the ICCPR (n 11) which protects both indigenous and minority rights, including their right to enjoy their culture. In *Ilmari Lämsä et al. v. Finland* Communication no 511/1992, UN Doc CCPR/C/52/D/511/1992, the indigenous Sami peoples brought a claim against the government for issuing quarrying permits that would disrupt their traditional reindeer herding practices. Although, the claim was unsuccessful on the basis that the permits granted did not interfere with the cultural practices of the Sami, it was recognised that this right might be violated if quarrying was permitted on a large scale.

See generally M Déjeant-Pons, M Pallemarts and S Fioravanti (eds), *Human Rights and the Environment: Compendium of instruments and other international texts on individual and collective rights relating to the environment in the international and European framework* (Council of Europe 2002); R Piccolotti and JD Taillant (eds), *Linking Human Rights and the Environment* (The University of Arizona Press 2003); D Shelton, 'Human Rights and the Environment: What Specific Environmental Rights have been Recognized?' (2006) 35 *Denver Journal of International Law and Policy* 129.

¹³ KJ Vandeveld, *US International Investment Agreements* (Oxford University Press 2009) 742 – 743. See J McIlroy, 'Canada's New Foreign Investment Protection and Promotion Agreement' (2004) 5 *The Journal of World Investment and Trade* 621; M Kinnear and R Hansen, 'The Influence of Chapter 11 in the BIT Landscape' (2005) 12 *University of California Davis Journal of International Law and Policy* 101; G Gagné and J-F Morin, 'The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT' (2006) 9 *Journal of International Economic Law* 357; C Lévesque, 'Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond' (2006) 44 *Canadian Yearbook of International Law* 249.

¹⁴ Canada Model Foreign Investment Protection and Protection Agreement <<http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf>> accessed 8 July 2013 (2003 Canadian Model FIPA).

to Article 1114(2) NAFTA.¹⁵ Alleged violations of Article 11 are to be resolved by way of consultations.¹⁶ The inclusion of a specific provision addressing environmental law within the context of FDI indicates an acceptance that FDI may have environmental consequences. However, this attribute associated with ‘unity’ remains superficial. The environmental obligations in Article 11 are limited to the conduct of the host state in the pre-establishment phase of FDI. Further, this provision is largely unenforceable due to its vague language¹⁷ and its reliance on informal dispute resolution mechanisms.

Article 10 of the 2003 Canadian Model FIPA provides for ‘General Exceptions’, which permit a party to take measures (that are not arbitrary, unjustifiably discriminatory or a disguised restriction on trade or investment) to protect, amongst other things, human, animal, plant life or health¹⁸ and exhaustible natural resources.¹⁹ Under the terms of Article 10, there is partial interaction between the investment protection standards governing the on-going conduct of the investment and international environmental law. The structure of this provision as an ‘exception’ to the investment standards indicates that international investment law and international environmental law may not be considered to be of equal merit within the FIPA. An alternative approach would have been to include a provision clearly establishing the environmental obligations of each party.²⁰ Nonetheless, the existence of an exception that addresses environmental concerns may equally suggest a certain degree of unity as international investment law is not considered to be of paramount importance. Given that this exception is untested,²¹ any determination regarding the unity provided by this exception is contingent on the manner in which it will be applied in ICSID arbitration. In light of this, it is difficult to conclude whether this exception by itself corroborates unity or fragmentation between international investment law and international environmental law.

¹⁵ McIlroy (n 13) 635.

¹⁶ 2003 Canadian Model FIPA (n 14) Article 11.

¹⁷ McIlroy (n 13) 635.

¹⁸ 2003 Canadian Model FIPA (n 14) Article 10(1)(a).

¹⁹ Ibid Article 10(1)(c).

²⁰ R Echandi, 'Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking' in K Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to Key Issues* (Oxford University Press 2010) 19.

²¹ S Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037, 1062.

The 2003 Canadian Model FIPA does not expressly address labour standards. NAFTA jurisprudence during the 1990s focused on environmental claims rather than labour claims, which may have influenced the nature of the provisions that were included in the 2003 Canadian Model FIPA. Yet, the provisions addressing health and safety standards may be wide enough to include labour standards.²²

Whilst attempting to balance the rights of foreign investors and host states,²³ the overall approach of the 2003 Canadian Model FIPA demonstrates a structural bias towards international investment law. This conclusion is supported by the lack of express reference to labour standards, the limited scope of Article 11 and the exclusion of international environmental law from formal dispute resolution procedures. As Article 10 has not yet been invoked, a final determination cannot be made regarding this provision. From these attributes, and based on the definitions of unity and fragmentation established in Chapter 2, the international investment law and international human rights law regimes remain largely fragmented within the 2003 Canadian Model FIPA.

The 2004 USA Model BIT²⁴ was the first USA Model BIT to refer to both environmental and labour standards in the operative section of a BIT.²⁵ These provisions were updated, and strengthened, as part of the review process that resulted in the 2012 USA Model BIT^{26, 27}. As a result, it may display a greater degree of unity than that exhibited by the 2003 Canadian Model FIPA.

Article 12(2) of the 2012 USA Model BIT is designed to ensure that a party to the BIT does not provide preferential treatment to an investor by weakening, or derogating from, or failing to effectively enforce environmental law as a means of inducing or maintaining FDI. The definition of 'environmental law' is limited in scope by Article 12(4) to only include laws that are intended to protect the

²² McIlroy (n 13) 635.

²³ Ibid 644.

²⁴ 2004 United States of America Model Bilateral Investment Treaty <www.state.gov/documents/organization/117601.pdf> accessed 8 July 2013 (2004 USA Model BIT).

²⁵ Vandevelde (n 13) 742 & 746; Guntrip (n 9) 102.

²⁶ 2012 United States Model Bilateral Investment Treaty <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 8 July 2013 (2012 USA Model BIT).

²⁷ See P Di Rosa, 'The New 2012 U.S. Model BIT: Staying the Course' 2012) <<http://kluwerarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/>> accessed 8 July 2013; M Kantor, 'Little Has Changed in the New US Model Bilateral Investment Treaty' (27) ICSID Review - Foreign Investment Law Journal 335, 378.

environment, or prevent ‘danger to human, animal or plant life or health’ and where the risk of damage arises from specified forms of conduct.²⁸ Article 13 relates to labour standards. Article 13(2) provides that the parties are to ensure that they do not act inconsistently with labour rights as a means of inducing or maintaining FDI. Article 13(3) sets out which labour rights are considered to fall within the scope of Article 13(2). These are laws primarily drawn from the ILO Declaration on the Fundamental Rights and Principles of Work and Its Follow-Up²⁹ but also address acceptable working conditions.³⁰ Breaches of Articles 12 and 13 are to be resolved by invoking consultation mechanisms,³¹ and are excluded from the formal arbitration procedures.³² In addition to these substantive clauses, the preamble to the 2012 USA Model BIT refers to the parties’ ‘desire’ to achieve the objectives of the BIT ‘in a manner consistent with the protection of health, safety and the environment, and the promotion of internationally recognized labor rights’.

Despite the recognition of environmental and labour standards within the preamble to the 2012 USA Model BIT, the recent modifications to its terms do not enhance the unity of international investment law and international human rights law beyond that exhibited by the 2003 Canadian Model FIPA. The application of the 2012 USA Model BIT’s environmental and labour provisions (effectively preventing host state encouragement to invest based on lowered environmental and labour standards) extend beyond inducing FDI to its post-establishment phase and have restricted the use of hortative language³³ regarding the nature of the obligation. However, neither environmental nor labour standards are fully integrated into the 2012 USA Model BIT in the same manner as international investment law standards based on the comparative strength of their respective legal obligations. The scope of the provisions is restricted by the limited definitions of environmental law and labour standards. This demonstrates fragmentation between these regimes. The exclusion of environmental and labour standards from all formal dispute resolution

²⁸ This conduct is limited under Articles 12(4)(a) to (c) to, amongst other things, the release of pollutants or environmental contaminants; control over toxic materials and information related to their control; and, the protection of species of flora and fauna and their habitat.

²⁹ Declaration on Fundamental Principles and Rights at Work (concluded 18 June 1998) 37 ILM 1233.

³⁰ 2012 USA Model BIT (n 26) Article 13(3)(f). See Kantor (n 27) 376 – 378.

³¹ 2012 USA Model BIT Articles 12(6) and 13(4) respectively. See Kantor (n 27) 376 – 378.

³² 2012 USA Model BIT Articles 24 and 37(5). This is despite the terms of more recent FTAs. See Guntrip (n 9).

³³ Kantor (n 27) 377.

procedures³⁴ retains the structural bias towards international investment law found in the 2003 Canadian Model FIPA, again evidencing fragmentation.

It is submitted that the degree of fragmentation displayed by both the Canadian and USA Model BITs indicates that IIAs exhibit structural bias that would inhibit, if not preclude, the introduction of an express provision detailing a host state human rights defence in future IIAs. However, both Canada and the USA have closely followed the model generated by NAFTA when incorporating environmental and labour standards provisions within their BITs. Alternative methods of referring to environmental and labour standards, in addition to human rights obligations, have subsequently been used by non-NAFTA states. Therefore, the practice of non-NAFTA states provides further evidence of the degree of unity (or fragmentation) between international investment law and international human rights law within IIAs. These alternative approaches offer further insight into whether a clause setting out a host state human rights defence could become an accepted part of IIA practice.

The 2007 Draft Norwegian Model BIT³⁵ provides a unique example of a BIT that has made express reference to international human rights law. The preamble to the 2007 Draft Norwegian Model BIT referred to the Parties achieving the aims of the BIT in a manner consistent with ‘the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights’. In addition to references to environmental and labour standards, the parties to the BIT were to reaffirm ‘their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights’. The substantive provisions of the BIT broadly reflected the approach taken in the 2004 USA Model BIT and the 2003 Canadian Model FIPA,³⁶ with some modifications reflecting Norway’s regulatory policies intended to encourage development.³⁷

³⁴ Ibid 377 - 378.

³⁵ 2007 Draft Norway Model Bilateral Investment Treaty
<www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc>
accessed 8 July 2013 (2007 Draft Norwegian Model BIT).

³⁶ See, for example Article 11(1) *ibid* and Articles 12 and 13 2004 USA Model BIT (n 24) and Article 24 2007 Norwegian Draft Model BIT (n 35) and Article 10 2003 Canadian Model FIPA (n 14).

³⁷ Norwegian Government, ‘Comments on the Model for Future Investment Agreements’ 2007)
<italaw.com/documents/NorwayModel2007-commentary.doc> accessed 8 July 2013, 9, 11 & 12; PT

Overall, the response to the inclusion of international human rights law into the 2007 Draft Norwegian Model BIT was extremely negative. This was despite the references to international human rights law being contained in the Preamble, which does not generate any binding legal obligations, and at most, could inform the interpretation of provisions³⁸ that were previously acceptable to Canada and the USA. Nevertheless, businesses were not comfortable with the inclusion of references to international human rights law within the BIT, and environmental and labour groups did not feel that it adequately protected these interests due to the lack of enforceable remedies for breaches of these standards.³⁹ As a result, Norway was forced to temporarily abandon its BIT program.⁴⁰ This was, in part, due to the risk to the Norwegian government of losing the support of its dominant coalition party had it continued to support the proposed BIT, which could have resulted in the fall of the government.⁴¹ Norway's failed attempt to balance the interests of competing lobby groups within the terms of the BIT, and the consequential political risk that flowed from countering the views of their allies within the government, demonstrate some of the practical challenges involved in integrating two regimes within an IIA.

Despite the underlying political considerations, even if this attempt had been successful, the terms of the BIT would have been insufficient to evidence the unification of the international investment law and the international human rights law regimes. The 2007 Draft Norwegian Model BIT did not contain substantive provisions on international human rights obligations. Although the BIT reflected policies influenced by international human rights law, it remained investment focused by adopting the style of provisions utilised by Canada and the USA.⁴² The

Muchlinski, 'Trends in International Investment Agreements 2008/2009: Review of the Model Bilateral Investment Treaties of Norway, South Africa and the United States' in KP Sauvant (ed), *Yearbook on International Investment Law and Policy 2009 - 2010* (Oxford University Press 2010) 57 - 58.

³⁸ Preambles may be used to determine the object and purpose of the BIT (F Ortino, 'The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?' (2005) 7 *International Law Forum du droit international* 243, 246; Vandevelde (n 13) 82; Spears (n 21) 1065). Preambular statements have been informed the interpretation of the fair and equitable treatment standard in ICSID awards including *Azurix Corp v. The Argentine Republic* ICSID Case No. ARB/01/12, Award, 14 July 2006 [360]; *Siemens A.G. v. Argentine Republic* ICSID Case No. ARB/02/8, Award, 6 February 2007 [290].

³⁹ D vis Dunbar, 'Norway Shelves its Draft Model Bilateral Investment Treaty' 2009) <www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx> accessed 8 July 2013; Muchlinski (n 37) 59.

⁴⁰ vis Dunbar, (accessed 8 July 2013) (n 39); Muchlinski (n 37) 59.

⁴¹ Muchlinski (n 37) 81.

⁴² Ibid 59.

preamble would not have been capable of forming the basis of a claim before dispute resolution mechanisms. Whilst the preamble may have been used to support a human rights driven interpretation of the substantive terms, this of itself, would not counteract the inherent fragmentation imposed by the structure of the BIT. Consequently, the terms of the 2007 Draft Norwegian Model BIT supports the position that international investment law and international human rights law are characterised by a fragmented relationship in IIAs.

This review of selected Model BITs that have addressed environmental and labour standards, and in one case, international human rights law as well, illustrates a large degree of fragmentation between international investment law and international human rights law. This is due to several factors. Provisions addressing non-investment law interests are phrased in weaker legal terms and claims based on these provisions cannot be brought before formal dispute resolution mechanisms. This evidences a clear structural bias in favour of investment law. Attempts to make express reference to international human rights law in non-legally binding forms, such as preambles, have proved to be too controversial to be acceptable. Therefore, political acceptance remains a difficult hurdle to overcome. In short, none of the methods adopted in the Model BITs discussed above have achieved unity between international investment law and international human rights law.

An express provision in IIAs granting a host state human rights defence has the potential to resolve the fragmentation that exists between these regimes in IIAs. However, it is submitted that the structural bias that precludes unity between international investment law and international human rights law also prevents the introduction of such a clause. Given the consistent failure of states to confer equal legal standing upon international investment law and international human rights law within IIAs, the implication that can be drawn from the survey of Model BITs discussed above is that the international community is not ready to accept binding legal provisions addressing international human rights law in IIAs. This, in turn, prevents the introduction of a host state human rights defence directly into IIAs.

This position is supported by reference to the general body of IIAs. Notwithstanding the increase in the number of IIAs mentioning environmental and labour standards overall, the total number of IIAs that incorporate these standards

into their provisions is less than nine percent of the total number of IIAs.⁴³ This demonstrates that significant progress is still required before environmental and labour standards become commonplace within IIAs. Even sparser are direct references to human rights obligations within IIAs. Only two IIAs make any reference to human rights obligations and not within their substantive provisions.⁴⁴ These are found in FTAs, which, as outlined above, do not reflect the specific interaction between international investment law and international human rights law. The general absence of international human rights law from IIAs, regardless of their parity with investment law standards within IIAs, does not exhibit cohesion between these regimes in IIAs. This indicates that an express host state human rights defence in IIAs will not be forthcoming in the foreseeable future.

It is suggested that a key factor resulting in the fragmentation between international investment law and international human rights law is the political obstacles states encounter when trying to integrate non-investment law provisions in IIAs. The experience of Norway in 2007 evidences the challenge of trying to effectively balance the competing interests of foreign investors and lobby groups representing the interests of those keen to promote environmental, labour and human rights obligations in IIAs. Whilst the final result in that instance was unusually extreme, differences in the approaches of stakeholders in the investment regime regarding the content of the terms of Model BITs is not uncommon.

An example of the divergence in views regarding Model BIT provisions was exhibited during the re-drafting process that culminated in the 2012 USA Model BIT. As part of the review of the 2004 USA Model BIT, in July 2009, the Office of the United States Trade Representative and the Department of State called for written comments regarding the terms in which the new USA Model BIT should be

⁴³ In a survey conducted by the OECD in 2011 of 1623 IIAs, only 8.2% of IIAs in the sample contained a reference to environmental concerns. See OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD Publishing 2008) Chapter 3 'International Investment Agreements: A survey of Environmental, Labour and Anti-corruption Issues'; K Gordon and J Pohl, 'Environmental Concerns in International Investment Agreements: a survey' (2011) OECD Working Papers on International Investment No. 2011/1 OECD Investment Division.

⁴⁴ EFTA/Singapore FTA (n 7) which states in the preamble 'REAFFIRMING their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights'. The Canada/Colombia FTA (n 7) states in the preamble 'AFFIRMING their commitment to respect the values and principles of democracy and promotion and protection of human rights and fundamental freedoms as proclaimed in the *Universal Declaration of Human Rights*'.

drafted.⁴⁵ The submissions received, combined with discussion at a public hearing held during the same month,⁴⁶ indicate the polarisation of views regarding the extent to which environmental and labour standards should be introduced into what would become the 2012 USA Model BIT.

Two approaches were clearly discernable.⁴⁷ The first argued for increased investor protection. The policy considerations underlying this approach were primarily economic – for example, submissions were made seeking to include terms that would increase the competitiveness of USA based industries and protect USA investors in foreign jurisdictions.⁴⁸ The second approach pursued the strengthening of environmental and labour provisions, in one instance, by advocating for legally enforceable standards based on the ILO core labour standards and existing multilateral environmental agreements.⁴⁹ This dichotomy was outlined in the report summarising the submissions received.⁵⁰ In response to the report's conclusions, the USA Trade Representative, Ron Kirk acknowledged that 'the report demonstrates the complex nature of the issues and their importance to a wide range of stakeholders'.⁵¹

⁴⁵ Office of the United States Trade Representative, 'Notice of Bilateral Investment Treaty Program Review' 2009) <www.ustr.gov/about-us/press-office/blog/notice-bilateral-investment-treaty-program-review> accessed 8 July 2013.

⁴⁶ Office of the United States Trade Representative, 'Public Meeting Regarding the U.S Model Bilateral Investment Treaty Review' Press release, 29 July 2009' 2009) <www.ustr.gov/about-us/press-office/press-releases/2009/july/public-meeting-regarding-us-model-bilateral-investmen> accessed 8 July 2013.

⁴⁷ See LE Peterson, 'Advisory Committee Report offers some consensus, but many divergences, as to future of US Model investment treaty' 2009) <http://www.iareporter.com/articles/20091021_2> accessed 8 July 2013.

⁴⁸ Emergency Committee for American Trade, 'Written Statement of the Emergency Committee for American Trade Concerning the Administration's Review of the Model Bilateral Investment Treaty (BIT)' <<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a0247a>> accessed 31 October 2010.

⁴⁹ M Kaptur (et al.), 'US Reps. Kaptur, Hare, Sanchez, Michaud, and Sutton Comments on the Model Bilateral Investment Treaty' <<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a01605>> accessed 31 October 2010.

⁵⁰ Advisory Committee on International Economic Policy, 'Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty' (Report, 30 September 2009) <<http://www.state.gov/e/eeb/rls/othr/2009/131098.htm>> accessed 28 October 2010 (ACIEP Report).

⁵¹ Office of the United States Trade Representative, 'Advisory Committee on International Economic Policy Submits Report on Review of U.S. Model Bilateral Investment Treaty' (Press Release, 30 September 2009) <<http://www.ustr.gov/about-us/press-office/press-releases/2009/september/advisory-committee-international-economic-policy>> accessed 31 October 2010.

The economic and environmental and labour viewpoints indicate a division in perceptions by stakeholders regarding the function of international investment law that can loosely be classified into 'private' and 'public' interests respectively. The former focuses on investment protection while the latter consider the wider social impact of FDI. Although these approaches are not automatically incompatible, the strengthening of environmental and labour standards is often seen as reducing investment protection standards (and the economic viability of FDI).⁵² Conversely, stronger investment protection is often perceived to be at the expense of compliance with higher levels of environmental and labour protection.⁵³ As a result, a tension exists within international investment law between those who favour the historical role of international investment law as a form of investor (and investment) protection, and those who favour a developmental focus.

In part, the partition of international investment law in this manner may be due to the influence of individuals and non-state actors. Environmental and labour lobby groups initiated the introduction into international investment law of principles drawn from other *lex specialis* regimes, during the negotiation of NAFTA, evidencing the emerging influence that individuals and non-state actors have over the formulation of public international law. This trend is a continuing one, based on the number of public comments received during the re-drafting of the 2004 USA Model BIT. Given their potential influence over the final terms of the IIA, lobby groups from both 'private' and 'public' positions actively campaign to have their interests represented.

States are placed in the position of having to be seen to be responding to these calls for reform, by simultaneously acknowledging both public and private arguments and balancing these opposing views. The results of states' attempts to balance competing public and private interests are manifested within the provisions of IIAs. The final provisions adopted generally evidence a preference towards private perspectives of international investment law. Attempts to include public interests (such as environmental and labour standards and international human rights

⁵² See the statements of Canner S, Haworth McCandless J and Menghetti J; Donnelly S and Heather S in the ACIEP Report (n 50).

⁵³ Creating incentives by way of investment protection is seen as being inversely proportionate to the protection of the environment and labour standards, resulting in a 'race to the bottom'. See C Oman, 'Policy Competition for Foreign Direct Investment' (2000) OECD 7.

law) through weaker provisions, mirror the increasing but not yet determinative demand for public interests to be reflected in IIAs. It is the private focus adopted, which emphasises investment protection standards above developmental considerations, which results in the current degree of fragmentation and regime conflict within IIAs.

3.2.2 Preliminary Conclusion

The terms of IIAs determine the scope and structure of the international investment law regime. At present, IIAs display disparity between international investment law and international human rights law, both in the manner in which non-investment law provisions are structured, and the lack of recourse to dispute resolution mechanisms permitted by IIAs for breaches of non-investment law standards. This creates a clear structural bias within IIAs towards international investment law, despite the use of various methods to try and incorporate international human rights law. The structural bias within IIAs may be in response to a tension within international investment law between 'private' interests, favouring the foreign investor, and 'public' interests that seek to include standards drawn from, amongst other regimes, international human rights law. The continued debate regarding the role of private and public interests can be attributed to the role of individuals and non-state actors in the international investment law regime that was initiated during the negotiation of NAFTA. States respond to this by attempting to satisfy the demands of all stakeholders, but currently favour private interests given the mandate generated by the demands of foreign investors. The result of this combination of factors is that international investment law and international human rights law are fragmented.

From the perspective of a host state human rights defence, three implications flow from the analysis undertaken above. First, it is highly improbable that any host state human rights defence can be established by the inclusion of express provisions within IIAs. Although a model BIT has been drafted by an NGO that includes developmental considerations,⁵⁴ its provisions are yet to be adopted by any state. Consequently, at this point in time, this avenue for establishing a host state human

⁵⁴ International Institute of Sustainable Development, 'International Institute of Sustainable Development Model BIT' <http://wgbis.ces.iisc.ernet.in/biodiversity/sdev/investment_model_int_handbook.pdf> accessed 8 July 2013.

rights defence will be disregarded. Second, the reasons for the exclusion of international human rights law from IIAs appears to be linked to varied conceptions of the purpose of international investment law. The role that international human rights law is likely to have in international investment law is dependent on whether international investment law can be characterised as ‘private’ or ‘public’, or a combination of both. If it is the latter, an appropriate balance between the two competing interests will need to be achieved. Finally, given the fragmented nature of IIAs, ICSID arbitration is unlikely to focus on international human rights law standards as part of the dispute resolution process by its own volition. Despite this, given that an express provision in IIAs is not a viable option, a host state human rights defence will need to be established as part of the practice of ICSID arbitration. How this might be achieved will be considered in the next section.

3.3 INTERNATIONAL HUMAN RIGHTS LAW IN ICSID ARBITRATION

Despite the fragmented nature of international investment law and international human rights law within IIAs discussed above, and the resulting specialised investment focus of ICSID arbitration that gives rise to structural bias,⁵⁵ several ICSID arbitral awards have considered principles from international human rights law as part of their reasoning with varied outcomes.⁵⁶ An analysis of these awards permits a greater understanding of the extent to which regime conflict arises, and how ICSID arbitral practice addresses this form of conflict. Specifically, the manner in which these ICSID arbitral tribunals have interpreted human rights based arguments is instructive for the formulation of a host state human rights defence given that the defence will have to be introduced into the practice of ICSID arbitration, rather than through the use of an express provision in an IIA. By referring to existing ICSID arbitral practice, it becomes possible to identify the limitations that prevent the full incorporation of international human rights law into ICSID arbitration, and to extrapolate how these factors are likely to impede the establishment of a host state human rights defence.

To evaluate ICSID arbitral practice in this regard, this section considers those ICSID awards stemming from Argentina’s financial crisis in 2001/2002, in which

⁵⁵ See section 3.2.

⁵⁶ As will be discussed, these primarily stem from the 2001/2002 Argentine financial crisis.

Argentina justified its conduct based on international human rights law primarily as a defence against claims made by foreign investors. An examination of these awards, given their common factual background, and the adoption of relatively consistent arguments by Argentina, provides the opportunity to consider the individual approaches taken by ICSID tribunals to host state initiated, human rights based arguments. The reasons behind the limitations imposed on the introduction of international human rights law in ICSID arbitral practice are identified and analysed, before provisional conclusions are drawn regarding the extent to which international investment law and international human rights law co-exist in ICSID arbitration. Discussion then turns to what characteristics are required of a host state human rights defence to enable it to become operative within ICSID arbitration.

3.3.1 The Use of International Human Rights Law as a Host State Defence in ICSID Arbitration

Host states seeking to establish a defence against claims made by foreign investors have occasionally sought to justify their argument by reference to obligations sourced in international human rights law.⁵⁷ Of those ICSID arbitral tribunals that have considered human rights based defences, all have done so in the context of the Argentine financial crisis of 2001/2002.⁵⁸ Argentina's economic position worsened in the late 1990s⁵⁹ as a result of the Asian financial crisis.⁶⁰ To try and improve its

⁵⁷ Nine ICSID awards to date have considered host state arguments based on human rights considerations. These are *CMS Gas Transmission Company v. Argentine Republic* ICSID Case No. ARB/01/8, Award, 12 May 2005; *Azurix Corp v. The Argentine Republic*; *Siemens A.G. v. Argentine Republic*; *Sempra Energy International v. Argentine Republic* ICSID Case No. ARB/02/16, Award, 28 September 2007; *Continental Casualty Company v. Argentine Republic* ICSID Case No. ARB/03/9, Award, 5 September 2008; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (Decision on Liability) ICSID Case No. ARB/03/17, 30 July 2010; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (Decision on Liability) ICSID Case No. ARB/03/19, 30 July 2010; *SAUR International S.A. v. Argentine Republic* ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* ICSID Case No. ARB/03/23, Award, 11 June 2012.

⁵⁸ Ibid. All nine ICSID awards that have considered host state arguments based on human rights considerations address claims made by foreign investors in response to the impact of the 2001/2002 Argentine financial crisis.

⁵⁹ JE Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011) 247.

⁶⁰ ME Carranza, 'Poster Child or Victim of Imperialist Globalization? Explaining Argentina's December 2001 Political Crisis and Economic Collapse' (2005) 32 *Latin American Perspectives* 65, 71.

financial position, Argentina invoked austerity measures⁶¹ before taking a series of regulatory actions to try and secure its economic position.⁶² These regulatory measures included the termination of the 'Convertability Law' that pegged the Argentinian Peso against the US Dollar and the modification of public service contracts to the detriment of foreign investors.⁶³ This resulted in a large number of claims from foreign investors against Argentina that were all founded on Argentina's regulatory acts.⁶⁴ In response to several claims, Argentina raised arguments justifying its conduct by reference to human rights law.⁶⁵ The common factual background of these awards, and the employment of similar legal arguments in response to the claims made, makes it possible to identify general trends displayed by ICSID tribunals when they approach the issue of human rights defences.

Argentina presented two lines of argument as a defence against the claims pursued by foreign investors. The first was based on the constitutional status of human rights law within Argentinian law. The second argument was based on a state of necessity, sourced from both custom and treaty law.

The first of Argentina's arguments was based on the constitutional supremacy of human rights law within Argentinian law following constitutional reforms that occurred in 1994.⁶⁶ This position was adopted by Argentina in *Siemens v Argentina*.⁶⁷ Argentina had tendered for investors to establish an immigration control and personal identification system, including the provision of national identity cards.⁶⁸ Siemens, through a company incorporated in Argentina,⁶⁹ was

⁶¹ Ibid 69.

⁶² Alvarez (n 59) 248.

⁶³ Ibid 248 - 250.

⁶⁴ Ibid 248.

⁶⁵ *CMS Gas Transmission Company v. Argentine Republic* (n 57); *Azurix Corp v. The Argentine Republic* (n 57); *Siemens A.G. v. Argentine Republic* (n 57); *Sempra Energy International v. Argentine Republic* (n 57); *Continental Casualty Company v. Argentine Republic* (n 57); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (n 57); *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 57); *SAUR International S.A. v. Argentine Republic* (n 57); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (n 57).

⁶⁶ Article 75(22) was introduced into the Argentinian Constitution in 1994. It confers ten international human rights law instruments with primacy over the Constitution including UDHR (n 11); ICESCR (n 11); ICCPR (n 11); ICERD (n 11); CEDAW (n 11) and CRC (n 11). See J Koven Levit, 'The Constitutionalization of Human Rights in Argentina: Problem or Promise?' (1999) 37 *Columbia Journal of Transnational Law* 281.

⁶⁷ *Siemens A.G. v. Argentine Republic* (n 57).

⁶⁸ Ibid [81].

successful with its bid.⁷⁰ Various disputes arose between the parties regarding the implementation of the project,⁷¹ before it was terminated in response to the Argentine financial crisis.⁷² Siemens alleged that Argentina's conduct amounted to expropriation, and breached the fair and equitable treatment and non-discrimination standards of the BIT.⁷³

Argentina argued that the constitutionally entrenched human rights would be 'disregarded by recognizing the property rights asserted by the Claimant given the social and economic conditions of Argentina'.⁷⁴ The Tribunal noted:

This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case.⁷⁵

Argentina's failure to fully substantiate its human rights based claim also undermined the strength of its defence in *Azurix v Argentina*.⁷⁶ The US investor company, Azurix,⁷⁷ invested in a potable water supply and sewerage utility in Buenos Aires.⁷⁸ Azurix alleged breaches by Argentina of, amongst other things, the standards of fair and equitable treatment, non-discrimination and full protection and security in the US–Argentina BIT, in addition to arguing that the investment had been expropriated.⁷⁹ In the context of the Argentine financial crisis, Argentina raised 'the issue of a conflict between the BIT and human rights treaties that protect consumers' interests'.⁸⁰ According to expert evidence adduced by Argentina, 'a conflict between a BIT and human rights treaties must be resolved in favour of human rights because the consumers' public interest must prevail over the private interest of the service provider'.⁸¹ When considering this point, the Tribunal

⁶⁹ Ibid.

⁷⁰ Ibid [84].

⁷¹ Ibid [91] – [95].

⁷² Ibid [97].

⁷³ Ibid [213], [274] – [278], [310].

⁷⁴ Ibid [75].

⁷⁵ Ibid [79].

⁷⁶ *Azurix Corp v. The Argentine Republic* (n 57).

⁷⁷ Ibid [40].

⁷⁸ Ibid [38].

⁷⁹ Ibid [43].

⁸⁰ Ibid [254].

⁸¹ Ibid [254].

observed that '[t]he matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case'.⁸²

Argentina's failure to fully develop its defence in these disputes did not provide a sufficient basis for the ICSID tribunals to demonstrate the manner in which they address regime conflict. However, the decisions in *Siemens v Argentina* and *Azurix v Argentina* establish that ICSID arbitral tribunals dismiss arguments that do not have a clear legal formulation and are not fully substantiated. Without a clear foundation from which to proceed, an ICSID arbitral tribunal will be reluctant to consider *any* argument, regardless of whether it has a basis in international human rights law. This emphasises the need for any host state human rights defence to be fully articulated and supported, especially in the context of adversarial arbitral proceedings, which are party driven. Consequently, when a host state human rights defence is being established, which requires ICSID tribunals to consider law beyond international investment law (and to overcome the inherent structural bias of the investment law dispute resolution body) it will need to be fully supported and argued with precision.

The final award in which Argentina relied on the constitutional standing conferred upon human rights treaties to usurp the standards contained in the applicable BIT was in *CMS v Argentina*^{83, 84}. The tribunal did not recognise the existence of a conflict of norms that could give rise to human rights being considered as superior:

First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly there is no question of affecting fundamental human rights when considering the issues contemplated by the parties.⁸⁵

The decision in *CMS v Argentina*, whilst not rejecting the argument for failing to be fully articulated, rejects the legal basis of Argentina's constitutional argument in a cursory manner. In taking the approach cited, it has been stated that the ICSID arbitral tribunal:

⁸² Ibid [261].

⁸³ *CMS Gas Transmission Company v. Argentine Republic* (n 57).

⁸⁴ Ibid [114].

⁸⁵ Ibid [121].

seems to dismiss concerns raised as to the impact of the Argentine financial crisis on the human rights of the Argentine citizens by means of the following syllogism: property is a human right; investment treaties protect property; therefore, investment treaties are treaties which protect rather than harm human rights.⁸⁶

Whilst Argentina's argument may not have succeeded in any event, the dismissive stance of the tribunal demonstrates the structural bias that can exist in specialist dispute resolution bodies. The limited consideration given to Argentina's human rights defence results from the oversimplification by the ICSID arbitral tribunal of the potential conflict from an issue of regime conflict, between international investment law and international human rights law, to one of equating the two regimes. Thus, once the regimes were considered to be complementary, principles of international investment law were applied, given that the same result was purportedly to be achieved. The stance taken by this ICSID arbitral tribunal is indicative of the impact that a prevailing investment focus may have when addressing regime conflict. An approach, such as the one taken in *CMS v Argentina*, supports the wider proposition that international investment law and international human rights law are fragmented in ICSID arbitration. Fragmentation may lead to an indifferent attitude towards international human rights law by ICSID arbitral tribunals, which has the potential to inhibit the operation of a host state human rights defence.

The second line of argument taken by Argentina was to use human rights based considerations to establish a defence based on 'necessity'. In *Sempra v Argentina*,⁸⁷ Sempra, a US investor had invested in two natural gas distribution companies.⁸⁸ Following the Argentine economic crisis, Sempra alleged that Argentina's regulatory response resulted in the investment being expropriated in breach of the terms of the 1991 United States of America-Argentina BIT^{89,90}. Argentina argued that the customary international law 'state of necessity' defence was the relevant standard when applying Article XI of the BIT, which is a 'non-

⁸⁶ LE Peterson, *Human Rights and Bilateral Investment Treaties: mapping the role of human rights law within investor-state arbitration* (Rights and Democracy (International Centre for Human Rights and Democratic Development) 2009) 24 fn 53.

⁸⁷ *Sempra Energy International v. Argentine Republic* (n 57).

⁸⁸ *Ibid* [4].

⁸⁹ Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (United States of America - Argentina)(adopted 14 November 1991, entered into force 20 October 1994) 31 ILM 124.

⁹⁰ *Sempra Energy International v. Argentine Republic* (n 57) [95].

precluded measures' clause.⁹¹ This provision permits parties to the BIT to apply 'measures necessary' for the maintenance of public order, maintenance or restoration of international peace and security or the protection of its own essential security interests and precludes the wrongfulness of its actions under the BIT. As part of its defence, Argentina raised the need to maintain its constitutional integrity by complying with its obligations under the American Convention on Human Rights⁹² (ACHR).⁹³ The tribunal stated:

This debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners. Yet, the real issue in the instant case is whether the constitutional order and the survival of the State were imperiled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation. The Tribunal believes that the constitutional order was not on the verge of collapse, as evidenced by, among many examples, the orderly constitutional transition that carried the country through five different Presidencies in a few days' time, followed by elections and the reestablishment of public order. Even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.⁹⁴

By considering that Argentina's constitution remained stable throughout the crisis, the tribunal was able to circumvent the issue of Argentina's human rights obligations. Nonetheless, the tribunal recognised the complexity of the human rights implications of Argentina's argument, and in so doing did not dismiss its legal basis outright. The approach of the ICSID arbitral tribunal in this instance signifies that should norms from differing *lex specialis* regimes simultaneously apply to an investment dispute ICSID arbitration may, in some instances, be capable of considering relevant principles from outside of the international investment law regime. This suggests a more unified approach to international investment law and international human rights law, and may be indicative of a wider trend by some

⁹¹ Ibid [333]. This decision went before an ICSID Annulment Committee where the analysis on the issue of necessity undertaken by the ICSID arbitral tribunal was held to involve the tribunal acting with a manifest excess of powers. This does not impact the current analysis, which focuses on the manner in which the ICSID arbitral tribunal addressed regime conflict in this context, rather than the legal interpretation of 'necessary'. See *Sempra Energy International v. Argentine Republic* ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010.

⁹² ACHR (n 11).

⁹³ *Sempra Energy International v. Argentine Republic* (n 57) [331].

⁹⁴ Ibid [332].

ICSID arbitral tribunals to willingly consider the merits of human rights based arguments run by host states.

In *Continental Casualty v Argentina*,⁹⁵ Argentina's defence was again raised in the context of Article XI of the 1991 Argentina-United States BIT. The tribunal considered the economic and social impact of the financial crisis, including its impact on constitutional guarantees and fundamental liberties, and found Argentina's conduct to be in compliance with the terms of Article XI.⁹⁶ It further held that an 'objective assessment' of necessity 'must contain a significant margin of appreciation for the state'.⁹⁷ This stance, although based on a different legal foundation to that used in *Sempra v Argentina* would further evidence a more inclusive approach regarding the introduction of international human rights law to ICSID arbitration, especially given the tribunal's references to constitutional guarantees and fundamental liberties. The adoption of a similar approach to that taken in *Sempra v Argentina*, alludes to the prospect of a host state human rights defence being accepted by at least some ICSID arbitral tribunals.

In the cases of *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v Argentina*⁹⁸ and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentina*⁹⁹ the relationship between investment law and human rights was raised again in the context of the customary international law defence of state of necessity. These disputes related to investments in water concessions in Santa Fe and Buenos Aires respectively.¹⁰⁰ The tribunals were composed of the same arbitrators resulting in awards that were phrased in similar terms. In both cases Argentina argued that 'it adopted the measures in order to safeguard the human right to water of the

⁹⁵ *Continental Casualty Company v. Argentine Republic* (n 57).

⁹⁶ *Ibid* [180].

⁹⁷ *Ibid* [181].

⁹⁸ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (n 57).

⁹⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 57).

¹⁰⁰ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (n 57) [1]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 57) [1].

inhabitants of the country’.¹⁰¹ The tribunal in both awards considered the relationship between human rights and the BIT standards.

Argentina is subject to both international obligations, *i.e.* human rights and treaty obligations, and must respect both of them. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.¹⁰²

The approach taken by these ICSID arbitral tribunals, in which international human rights law obligations are seen as an independent legal obligation outside of the international investment law regime, reverts to a fragmented approach towards regime interaction. Similarly to the award in *CMS v Argentina*, the ICSID arbitral tribunal, so as to prioritise international investment law, simply discounts the relevance of potentially conflicting obligations sourced from international human rights law without further explanation.

Finally, Argentina has also raised international human rights law in the context of identifying the applicable law of the ICSID arbitral tribunal. Although this stance does not use international human rights law strictly as a defence, the applicable law of the ICSID arbitral tribunal may inform the outcome of its decision.¹⁰³ In *EDF v. Argentina*,¹⁰⁴ the tribunal considered the relationship between *jus cogens* obligations (including international human rights law) and the measures taken by Argentina during the economic crisis.¹⁰⁵ The tribunal did not ‘call into question the potential significance or relevance of human rights in connection with international investment law’¹⁰⁶ but found no evidential basis to link the claim made by the foreign investor to human rights.¹⁰⁷ Similarly, in *SAUR v. Argentina*,¹⁰⁸ the

¹⁰¹ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (n 57) [232]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 57) [252].

¹⁰² *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (n 57) [240]. See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (n 57) [262].

¹⁰³ The role of applicable law is discussed in Chapter 5. The scope of the applicable law dictates what law the ICSID arbitral tribunal can apply to the dispute. Therefore, if international human rights law forms part of the applicable law of the tribunal, there is the potential that it could be applied to the facts of the dispute, affecting the outcome of the decision.

¹⁰⁴ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (n 57).

¹⁰⁵ *Ibid* [909] – [914].

¹⁰⁶ *Ibid* [912].

¹⁰⁷ *Ibid* [914].

tribunal recognised that the right to water found in international law formed part of the tribunal's applicable law,¹⁰⁹ before requiring it to be 'counterbalanced' with investment protection standards sourced from IIAs.¹¹⁰ Both of these recent decisions demonstrate increasing recognition of the role of international human rights law within international investment law disputes, but neither fully elaborate on the manner in which the two regimes interact.

From these awards, two trends become clear. First, a tribunal is highly likely to reject any host state argument that is not properly articulated. Consequently, any host state claim needs to be fully established, both with a clear legal foundation and evidence in support. This is especially so when international human rights law is brought before an international investment law panel with a pre-existing structural bias. Second, there is a divergence in the manner in which ICSID arbitral awards deal with human rights based arguments. The awards of *Sempra v Argentina* and *Continental Casualty v Argentina* are indicative of a degree of willingness from ICSID arbitral tribunals to consider human rights based arguments. In *EDF v Argentina* and *SAUR v Argentina*, the relevance of international human rights law to ICSID arbitration was not questioned. In this sense, there is proof of some unity between international human rights law and international investment law, and a resulting willingness by ICSID arbitral tribunals to consider the human rights implications that flow from FDI. In contrast, the award in *CMS v Argentina* and both *Suez v Argentina* awards suggest that human rights arguments do not form part of the remit of an ICSID arbitral tribunal, are irrelevant to the dispute at hand, and, as a consequence, support the notion that the two regimes are fragmented. Given these distinct approaches taken by ICSID arbitral tribunals, it is necessary to consider why these trends exist, and what the underlying reasons for these attitudes towards international human rights law mean for the establishment of a host state human rights defence.

¹⁰⁸ *SAUR International S.A. v. Argentine Republic* (n 57).

¹⁰⁹ *Ibid* [330].

¹¹⁰ *Ibid* [332].

3.3.2 Host State Reluctance to Argue International Human Rights Law Defences

Disputing parties should be aware that all claims and defences need to be fully articulated and substantiated for a tribunal to consider and apply them. Yet, a trend illustrated in both the *Siemens v Argentina* and *Azurix v Argentina* awards was Argentina's 'halfhearted'¹¹¹ attempt to develop its human rights based argument. To establish a host state human rights defence, any reticence on the part of host states regarding the invocation of international human rights law in ICSID arbitration will need to be overcome.

States may be reluctant to pursue human rights based arguments in international dispute resolution fora that are not human rights focused for several reasons. These include that states consider human rights to be an insignificant aspect of non-human rights specific claims.¹¹² Further, human rights considerations may undermine the state's litigation strategy.¹¹³ Additionally, evidence may be difficult to obtain,¹¹⁴ resulting in a claim not being able to be fully substantiated, or alternatively, states may not have the expertise to espouse the claim.¹¹⁵ Given the political overtones of human rights, their introduction may inflame the dispute further.¹¹⁶ Whilst all of these reasons are relevant to ICSID arbitration, it is posited that host states are fearful of admitting to violations of international human rights law in dispute resolution fora.

It is incumbent on the host state to comply with its international human rights law obligations. These obligations extend to protecting those individuals in the host state's territory from acts that may result in human rights violations, including the acts of foreign investors.¹¹⁷ Consequently, by raising human rights violations within its own territory, as a defence in ICSID arbitration, a host state is highlighting its

¹¹¹ U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10 *Journal of World Investment and Trade* 653, 672.

¹¹² D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *The American Journal of International Law* 611, 615.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ See, in the context of the ICCPR (n 11), UNHRC, 'General Comment no 31' on 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [8].

potential liability under international human rights law.¹¹⁸ Given the inherent structural bias of ICSID arbitration towards international investment law, it is unlikely that host states will be able to resolve both international investment law and international human rights law claims simultaneously in this forum. Therefore, any admission by a host state of an international human rights violation may give rise to additional liability in a separate human rights dispute resolution forum. Equally, human rights dispute resolution fora exhibit structural bias that precludes a host state from addressing both claims in this forum. This was demonstrated in the Inter-American Court of Human Rights decision of *Sawhoyamaxa Indigenous Community v Paraguay* where the Court rejected the use of an investment treaty to justify human rights violations in a cursory manner.¹¹⁹ As a result, a host state may be found liable under both regimes, which acts as a disincentive to raise an international human rights law defence in ICSID arbitration. Should international human rights law be raised in ICSID arbitration, the potential duplication of liability may give rise to two further difficulties for host states.

The first challenge is that human rights violations related to FDI are likely to affect a particular group of individuals to a larger extent. This may be by virtue of their physical location, or may be due to the specific impact of the investment project, for example, local indigenous communities being adversely affected by a mining project. Given this, raising a human rights defence presupposes that the 'state is willing to take up the claims of individuals and social groups against the investor'.¹²⁰ A host state may not wish to defend claims brought by a foreign investor on the basis of international human rights law when it has 'authorized the investment against the wishes of special segments of the population'.¹²¹ By dismissing the human rights arguments of those who opposed the investment initially, and then expressly relying on them to preclude liability for a breach of the

¹¹⁸ B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century - Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) fn 11; J Harrison, 'Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 414.

¹¹⁹ *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006) [140].

¹²⁰ F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *European Journal of International Law* 729, 738.

¹²¹ *Ibid.*

IIA, the inconsistent acts of a host state would appear to be a cynical use of human rights to avoid liability in ICSID arbitrations. This is likely to ostracise those who have suffered human rights violations. The risk of claims being brought in human rights fora is exacerbated if sectors of the population had originally opposed the investment on the same human rights basis, view the use of a human rights defence by a host state in a cynical manner, and are seeking legal remedies for the violations that occurred.

The second consideration is that, should a host state be willing to pursue this course of action, and receive an adverse decision in a human rights dispute resolution forum, this would, in turn, strengthen the content of human rights obligations that currently do not have clearly defined boundaries.¹²² Whilst this may be beneficial for the development of the human rights regime more generally, it is not in the host state's interest to pursue this goal at its own expense. Further, changes to the scope or interpretation of international human rights law may negatively impact the activities of other foreign investors, and could potentially result in more investment claims.

This combination of factors results in the absence of human rights based arguments in ICSID arbitration, or as demonstrated by the Argentina cases discussed above, the presentation of arguments that are not fully articulated by the host state. This outcome is symptomatic of the fragmentation of public international law. The inability of public international law to simultaneously address international investment law and international human rights law obligations, when they stem from a single factual scenario, without the potential duplication of liability, reveals the degree of structural bias evident in both regimes. A host state is unlikely to raise human rights in ICSID arbitration, even when it may be a justification for the breach of an IIA, and may be required by international human rights law. This is because neither ICSID arbitration nor human rights dispute resolution fora are able to adequately consider the impact or importance of the other legal regime. Nonetheless, the stance taken by host states, of avoiding a human rights defence in ICSID arbitration, is likely to further increase the fragmentation between the regimes. This is because when host state human rights defences are infrequently raised only on a

¹²² Simma and Kill (n 118) fn 21.

superficial level, ICSID arbitral tribunals are reluctant to address human rights arguments given their novelty and the structural bias of ICSID arbitration. Consequently, the conflict between the international investment law and international human rights law regimes within ICSID arbitration will continue to favour international investment law.

This level of regime conflict justifies the introduction of a host state human rights defence to 'de-fragment' these regimes. However, the proposed host state human rights defence will need to overcome the risks encountered by host states when invoking international human rights law in ICSID arbitration. Given the current degree of fragmentation between international investment law and international human rights law, these risks cannot be completely eliminated, but they are largely capable of being managed. This can be accomplished by limiting the circumstances in which the defence can operate, in conjunction with emphasising the host state's best efforts to comply with international human rights law.

Host states should only be able to consider whether to bring a human rights defence in very limited circumstances. This avoids the initial concern regarding the duplication of a host state's potential liability in multiple dispute resolution fora in the majority of cases. It is contended that a human rights defence should only operate in cases of either grave human rights breaches or persistent human rights breaches. By limiting the scope of the defence to these types of violations, host states only need to decide whether to raise the defence when the magnitude of the breach warrants it. This stance is justified by other forms of violations of international human rights law being dealt with under the domestic law of the host state, in accordance with established principles regarding the enforcement of international human rights law.¹²³ As a result, only those claims that involve large-scale human rights violations caused by the investment project will raise the risk of dual liability.

In those instances where a host state human rights defence is being considered by a host state, the defence needs to be presented in such a way that avoids claims by its affected population that the host state is acting in a cynical manner. This too minimises the risk of liability in multiple dispute resolution fora as

¹²³ J Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 667.

the affected population are less likely to seek redress if their position is recognised by the host state. To counter initial opposition to the use of the host state human rights defence by sectors of its population, host states can argue that the conduct of the foreign investor is the cause of the breach of the human rights obligation, rather than the investment itself. It becomes more plausible to argue that the investment itself is not inherently breaching human rights, but rather, that the violations were caused by conduct of the foreign investor. On this basis, an unexpectedly grave human rights violation exceeds what the host states could have possibly expected from the normal operation of the investment. Alternatively, when the foreign investor commits persistent breaches, the human rights violation eventuates despite consistent warnings regarding the foreign investor's conduct through domestic proceedings. When presented in either of these manners, the host state can be seen to have taken action against the foreign investor, in contrast to protecting its own position. This increases the credibility of the host state human rights defence.

This approach also potentially limits host state liability for a breach of the human rights standard as the host state will either not have had any warning about the unexpected grave breach, or will have taken action under their domestic law for persistent breaches, but to no avail. Both scenarios illustrate host state compliance with their international human rights obligations as they are protecting the human rights of their population. Should a human rights defence be successful, it would demonstrate that the host state acted in the best interests of the host state population in breaching the IIA, thereby preventing claims in human rights fora. Any claims made by individuals in human rights dispute resolution fora would arguably be considered in the light of this background, or at a minimum, evidence of host state conduct could be presented to the forum. If this stance cannot be taken due to some contributory liability on behalf of the host state, it will be for the host state to determine if ostracising a sector of their population, and their potential liability in human rights fora, outweigh the option of bringing the defence.

It is accepted that establishing a host state human rights defence remains a difficult argument for a host state to present to an ISCID arbitral tribunal. Notwithstanding, by limiting the use of the host state human rights defence to instances of grave or persistent human rights breaches, a host state's exposure to dual liability is minimised. Host states can avoid ostracising the population affected

by the human rights violation by focusing on the conduct of the investor. However, host states would have to simultaneously determine the degree to which they may be culpable for failing to act in light of the given circumstances. Despite these difficulties, the factors giving rise to the reluctance of host states to argue international human rights law in ICSID arbitration can be managed. This results in the host state human rights defence retaining its potential to ‘de-fragment’ international investment law and international human rights law in ICSID arbitration.

3.3.3 The Role of Arbitrators in Evaluating International Human Rights Law Defences

A defence based on international human rights law not only needs to be fully argued, the arbitrators hearing the defence must also be receptive to human rights being introduced into ICSID arbitration. ICSID arbitral tribunals have diverged in the approach taken when considering the human rights based defences raised by Argentina in the ICSID arbitrations that flowed from its 2001/2002 economic crisis. Whilst some ICSID arbitral tribunals accepted the potential application of a human rights defence, others were dismissive of any interaction between the international investment law and international human rights law regimes. To evaluate the potential application of a host state human rights defence in ICSID arbitration, the possible reasons behind the reluctance of arbitrators to acknowledge human rights based claims in ICSID arbitration will be examined.

The reluctance of ICSID arbitrators to engage with a human rights defence may be attributed to their limited mandate. IIAs, together with the ICSID Arbitral Rules and the ICSID Convention, delimit the mandate of an ICSID arbitral tribunal.¹²⁴ Given the lack of provisions addressing international human rights law in the vast majority of IIAs,¹²⁵ there is little scope for arbitrators to fully embrace international human rights law within ICSID arbitration. Therefore, arbitrators may have concerns regarding the extent to which an ICSID arbitral tribunal’s jurisdiction extends to human rights claims,¹²⁶ and whether the consideration of human rights

¹²⁴ This is discussed in detail in Part B.

¹²⁵ See section 3.2.1.

¹²⁶ P-M Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 55.

law would exceed the limits of the applicable law.¹²⁷ In the event that international human rights law is mistakenly applied in excess of the arbitrator's powers, the award rendered may be annulled.¹²⁸ The annulment of an award on this basis may affect an arbitrator's professional reputation.

A further suggestion as to why investment tribunals avoid addressing human rights considerations is that tribunals attempt to avoid the controversial issues entailed in international human rights law.¹²⁹ Given the political disagreements that accompanied the development of human rights, it may be that tribunals are keen to de-politicise investment tribunals and avoiding human rights issues maintains the apolitical nature of the dispute resolution forum.¹³⁰

In light of the opposition of numerous states to granting jurisdiction to international adjudicatory bodies in the human rights sphere arbitral investment tribunals ... are cautious not to address directly human rights issues that are involved in investment disputes.¹³¹

Despite the initial legitimacy of these two suggestions, it is suggested that neither fully explain why a body of arbitrators remain supportive of human rights claims within ICSID arbitration. It would seem obtuse that those arbitrators that consider international human rights law as part of ICSID arbitration would fail to take into account the risk of annulment proceedings, or allegations of politicising the ICSID arbitral system. Given this, it is posited that arbitrators' concerns reflect a broader, underlying mentality regarding the role of ICSID, and more generally, ITA. This mentality may result from the historical development of ITA.

ITA merges substantive public international law principles with procedure drawn from ICA.¹³² This generates tensions given the differing approaches

¹²⁷ Spears (n 21) 1047.

¹²⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 171 Article 52. See Spears (n 21) 1047.

¹²⁹ M Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 112; M Hirsch, 'Human Rights and Investment Tribunals Jurisprudence Along the Public/Private Divide' in T Weiler and F Baetens (eds), *New Directions In International Economic Law: In Memoriam Thomas Wälde* (Martinus Nijhoff Publishers 2011) 15.

¹³⁰ Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' (n 129) 113; Hirsch, 'Human Rights and Investment Tribunals Jurisprudence Along the Public/Private Divide' (n 129) 15.

¹³¹ Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' (n 129) 113.

¹³² SW Schill, 'Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and Its Impact on the Role of the Arbitrator' in T Weiler and F Baetens (eds), *New*

historically taken to dispute resolution in these fields. Whilst public international law tribunals have traditionally focused on the systemic impact of their decisions, including the wider societal implications, ICA tribunals tend to focus on resolving the isolated dispute between the two parties taking into account the commercial sensitivities involved.¹³³ The stark divergence¹³⁴ in these approaches results in arbitrators in ITA facing a dilemma as to which methodology to favour,¹³⁵ given that its operation combines both practices.¹³⁶

Many arbitrators come from commercial backgrounds, without a prior experience of dealing with disputes involving sovereign states. These arbitrators are prone to extend notions of commercial dispute resolution without adequate consideration of public law issues in the dispute.¹³⁷

The outcome may depend on the perceptions of the arbitrator in relation to the scope of their role, how they view the underlying purpose of ITA and even what they identify as the rationale of international investment law more generally. These views will be formed based on the background, training, experience and peer group of the arbitrator in question.¹³⁸ It is submitted that the inclination of an arbitrator to prefer either ICA or public international law aspects of ITA may influence how easily international human rights law may be adopted within ICSID arbitration given its

Directions in International Economic Law: In Memoriam Thomas Wälde (Martinus Nijhoff Publishers 2011) 23.

¹³³ M Sornarajah, 'A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment' (2006) 6 *International Environmental Agreements* 329, 348. See G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 128, C Thomas and M Ewing-Chow, 'The Maturation of Investment Treaty Arbitration' (2010) 25 *ICSID Review - Foreign Investment Law Journal* 3, 11.

¹³⁴ SW Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden Journal of International Law* 401, 404; TW Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State' (2010) 26 *Arbitration International* 3, 6. For a contrasting view point see S Wilske, M Raible and L Markert, 'International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or only a "Status Thing"?' (2008) 1 *Contemporary Asia Arbitration Journal* 213, who argue that the differences between international commercial arbitration and investment treaty arbitration are exaggerated.

¹³⁵ Kalderimis suggests that neither approach is appropriate for 'constructively developing this new field' (D Kalderimis, 'Investment Treaty Arbitration as Global Administrative Law: What this Might Mean in Practice' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 149).

¹³⁶ TW Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 725.

¹³⁷ Sornarajah (n 133) 348.

¹³⁸ Wälde, 'Interpreting Investment Treaties: Experiences and Examples' 725; A Mills, 'The Public-Private Dualities of International Investment Law and Arbitration' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 105.

public international law origins. This proposition will be considered by contrasting 'private' and 'public' approaches to ITA.¹³⁹

The 'private' approach to ITA is sourced from ICA. ICA was developed in response to the need for an alternative dispute resolution mechanism to state run courts for commercial matters.¹⁴⁰ The need for a separate dispute resolution mechanism for commercial disputes was required:

to allow merchants to choose their own judges, since the justice of feudal lords or incipient states, oblivious to merchant custom and practices and likely to interfere in commercial deals, was perceived as inappropriate for deciding on commercial matters.¹⁴¹

Consequently, ICA addresses the specific dispute resolution needs of merchants and the manner in which ICA is structured, and is conducted, mirrors these specialist origins.

Substantively, ICA usually addresses disputes between private parties deriving from 'private' law obligations such as contractual duties.¹⁴² Therefore, ICA focuses on the respective civil liability of the disputing parties by reference to their mutually agreed terms. This arguably entails a distinct methodology that does not necessarily translate to disputes with public law elements, such as international human rights law, given the wider context and impact of human rights, which extend beyond the disputing parties.

¹³⁹ This discussion relies on classifying ITA and ICA along broad notions of 'public' and 'private' approaches respectively. As noted by several authors, such a definitive distinction is artificial, but retains its efficacy when generalising the underlying purposes behind each legal regime. It is for the latter reason that the terms 'public' and 'private' are referred to in this section. See Van Harten (n 133); G Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims Against the State' (2007) 56 ICLQ 371, 373 – 375; A Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 Journal of International Economic Law 469; Mills, 'The Public-Private Dualities of International Investment Law and Arbitration' (n 138).

¹⁴⁰ A Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 1; ML Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 1.

¹⁴¹ HA Grigera Naon, 'The Role of International Commercial Arbitration' (1999) 65 Arbitration 266, 270.

¹⁴² GC Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in C Binder and others (eds), *International Investment Law in the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 784, 792; Schill, 'Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and Its Impact on the Role of the Arbitrator' (n 132) 26.

Procedurally, the consent of the disputing parties¹⁴³ in the form of a contractual agreement to arbitrate¹⁴⁴ is fundamental to ICA. Once the parties have given their consent, the principle of party autonomy¹⁴⁵ confers the disputing parties with the freedom to determine both the procedural and substantive laws to be applied to their dispute and to select the individual (or individuals) who will comprise the arbitral tribunal that will make the final determination.¹⁴⁶ Hence, once consented to, ICA can be tailored to the exact needs of the parties in the light of the particular dispute. Further, ICA ‘does not attempt to project solutions attained in one dispute to other disputes’¹⁴⁷ and as such, does not operate a system of precedent. As a result, ICA tribunals are not required to pursue wider systemic or social needs taking into account ‘social or community interests’ in the same manner as state based justice,¹⁴⁸ thereby hampering the introduction of international human rights law into ITA, such as ICSID arbitration. In short, ICA merely determines the extent to which the parties may be legally liable without reference to external expectations or state based considerations that traditionally form the basis of human rights claims.

The aspects of ICA that are indicative of a ‘private’ approach, have the potential to limit the extent to which ICSID arbitrators may be willing to address human rights based arguments. In particular, the limited references to international human rights law in IIAs, when combined with the lack of public accountability and the ‘issue specific’ focus of arbitral tribunals, present challenges for host states who seek to argue a defence to an investment claim based on the wider human rights implications of the investment giving rise to the dispute. These difficulties are exacerbated by the attitude of arbitrators who consider that ICSID arbitration should operate in the same manner as ICA.

¹⁴³ Van Harten, *Investment Treaty Arbitration and Public Law* (n 133) 59; E-U Petersmann, 'International Rule of Law and Constitutional Justice in International Investment Law and Arbitration' (2009) 16 *Indiana Journal of Global Legal Studies* 513, 526; C Schreuer, 'The Future of Investment Arbitration' in MJ Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010), 790.

¹⁴⁴ Van Harten, *Investment Treaty Arbitration and Public Law* (n 133) 59.

¹⁴⁵ Ibid 59; Moses (n 140) 1; Petersmann (n 143) 527; Hirsch, 'Human Rights and Investment Tribunals Jurisprudence Along the Public/Private Divide' (n 129) 13.

¹⁴⁶ Grigera Naon (n 141) 270; F Marrella, 'Human Rights, Arbitration and Corporate Social Responsibility in the Law of International Trade' in W Benedek, K de Feyter and F Marrella (eds), *Economic Globalisation and Human Rights* (Cambridge University Press 2007) 284; Moses (n 140) 1.

¹⁴⁷ Grigera Naon (n 141) 271. See also Moss (n 142) 793.

¹⁴⁸ Grigera Naon (n 141) 267.

Arbitrators who view ICSID arbitration in a similar manner to ICA will approach their role in order to give effect to the aims of ICA. This ‘private’ law approach can be characterised by the arbitrator focusing on the equality of the parties.¹⁴⁹ Consequently, they are unlikely to defer to, or make exceptions for, one party being a state,¹⁵⁰ and may fail to account for the difficulties that states encounter balancing competing interests and legal obligations. In reaching their decision, the arbitrator usually takes a fact based approach to the dispute to reach a decision on the specific issues requested by the parties based primarily based on the arguments and documents that counsel present to the tribunal.¹⁵¹ Considerations such as consistency with similar decisions are likely to play a minimal part of the arbitrator’s role, as their function is to determine the specific dispute between the parties.¹⁵² All of these factors equate a state with a private individual and negate the complicating factors associated with statehood and sovereignty, such as protecting the population of the state and balancing obligations set out in a variety of legal regimes in public international law.

The adoption of a ‘private’ law approach within ITA evidences these commercial characteristics. Although this has not yet been expressly stated in ICSID arbitrations, it has arisen in the context of the UNCITRAL Rules when interpreting the investment provisions in Chapter 11 of NAFTA. When describing its role, the NAFTA tribunal in *Glamis Gold v United States of America* stated:

¹⁴⁹ N McDonald, 'More Harm than Good? Human Rights Considerations in International Commercial Arbitration' (2003) 20 *Journal of International Arbitration* 523, 529; Van Harten, *Investment Treaty Arbitration and Public Law* (n 133) 124; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 407.

¹⁵⁰ Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State' (n 134) 6 – 11.

¹⁵¹ M Hirsch, 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing Ltd 2008) 332; Wälde, 'Interpreting Investment Treaties: Experiences and Examples' (n 136) 725 – 726; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 407; Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (n 139) 485; Mills, 'The Public-Private Dualities of International Investment Law and Arbitration' (n 138) 101 – 102; M Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing Ltd 2011) 225.

¹⁵² Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 407 – 408; Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (n 139) 485.

This Tribunal was constituted to address a particular dispute between Glamis and the United States of America. In this sense, the Tribunal sees its mandate under Chapter 11 of the NAFTA as similar to the case-specific mandate ordinarily found in international commercial arbitration. In the normal contractual setting, a tribunal is a creature of contract, tasked with resolving a particular dispute arising under a particular contract.¹⁵³

The tribunal went on to recognise that a ‘case-specific mandate is not license to ignore systemic implications’¹⁵⁴ but emphasised that it ‘in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it’.¹⁵⁵

A similar approach was taken in the award of *Romak v Uzbekistan*,¹⁵⁶ which was also governed by the UNCITRAL Arbitration Rules. When determining the applicable law, and the degree to which the tribunal could refer to a variety of sources, the tribunal stated that:

Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of “arbitral jurisprudence.” The Arbitral Tribunal’s mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general. It is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law. This is not to say that the Arbitral Tribunal will simply ignore awards rendered by distinguished arbitrators. The Arbitral Tribunal may and will examine them, not for the purposes of extracting from them rules of law, but as a means to provide context to the Parties’ allegations and arguments, and as to explain succinctly the Arbitral Tribunal’s own reasoning.¹⁵⁷

The recognition and adoption by a tribunal of a ‘private’ approach, usually associated with ICA, demonstrates how a stance much like the one taken in *Glamis Gold v United States of America* and *Romak v Uzbekistan* might inhibit the adoption of a human rights defence. By viewing the mandate of the tribunal as being case specific, and resolving the dispute by reference to the immediate concerns of the

¹⁵³ *Glamis Gold v United States of America* UNCITRAL, Award, 8 June 2009 [3].

¹⁵⁴ *Ibid* [3].

¹⁵⁵ *Ibid* [7].

¹⁵⁶ *Romak S.A. v. Republic of Uzbekistan* UNCITRAL, Award, 26 November 2009.

¹⁵⁷ *Ibid* [171].

disputing parties, the ability of the arbitral tribunal to draw upon wider considerations and to approach the dispute systemically is excluded. Given the lack of express reference to human rights in IIAs, a human rights defence relies on wider policy implications being adopted by an arbitral tribunal. The adoption of a 'private' approach within ICSID arbitrations would prevent the establishment of a host state human rights defence, resulting in the on-going fragmentation of international investment law and international human rights law.

This outcome can be contrasted to how a 'public' approach operates within ITA. The 'public' approach questions the appropriateness of a 'private' approach to ITA due to the sovereign attributes displayed by the host state. Although there are some similarities between ICA and ITA,¹⁵⁸ unlike ICA, which is based on contractual consent between private parties, the 'public' approach to ITA is founded on a unilateral consent conferred by the host state, usually in the IIA.¹⁵⁹

Host state consent to ITA is said to differ to party consent in ICA because it amounts to a sovereign act.¹⁶⁰ This is by virtue of it being given when entering into the IIA in the international sphere.¹⁶¹ Further, consent is in a generalised form¹⁶² and is given to all investors and investments that qualify for protection under the terms of the IIA.¹⁶³ Consent is also prospective¹⁶⁴ in that the host state provides consent for

¹⁵⁸ Both forms of arbitration are characterised by a private party claiming before an arbitral tribunal and rely on the New York Convention to enforce arbitral awards. Investment treaty arbitration also relies on procedural rules developed for international commercial arbitration as a procedural model for FDI disputes. See G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121, 139; B Choudhury, 'Democratic Implications Arising From the Intersection of Investment Arbitration and Human Rights' (2009) 46 *Atlanta Law Review* 983; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 402.

¹⁵⁹ Hirsch, 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' (n 151) 332; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 411; Schreuer (n 143) 790; Y Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 *Arbitration International* 129, 130.

¹⁶⁰ Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims Against the State' (n 139) 378 – 380; C Brower and SW Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 *Chicago Journal of International Law* 471, 490.

¹⁶¹ Van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (n 158) 143 – 144; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 411.

¹⁶² Van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (n 158) 128; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 411.

¹⁶³ Van Harten, *Investment Treaty Arbitration and Public Law* (n 133) 63.

the duration of the treaty prior to any disputes having arisen. Consequently, the host state is unaware of the precise nature of any disputes that may arise¹⁶⁵ and who the exact claimant will be.¹⁶⁶ This precludes the operation of party autonomy, which forms the foundation of ICA, and removes any element of negotiation regarding the form of dispute resolution.¹⁶⁷ Therefore, the form of ITA is predetermined¹⁶⁸ and applies to all disputes that arise under the IIA. These characteristics of the ‘public’ approach to ITA transform, what in ICA is a private dispute between two equal parties, who have expressly agreed the terms under which the dispute resolution method will operate, into a fundamentally different type of dispute resolution.

The ‘public’ law conception of ITA, by taking into account that the respondent is a state, who also has competing obligations sourced from international law, potentially results in a wider conception of the purpose of ITA.¹⁶⁹ State obligations from other regimes, such as international human rights law, may have more bearing as ITA becomes less ‘issue specific’ and party focused. By taking into account the wider implications of FDI, arbitrators are more likely to consider issues beyond the precise terms of the IIA. As a result, this ‘public’ view of ITA significantly changes the focus of ITA away from the considerations displayed in ICA, increasing the likelihood of the introduction of a human rights defence.

Arbitrators who follow a ‘public’ stance recognise that, despite the ICA procedure, the decision making process in ITA has a significant public function.

¹⁶⁴ Thomas and Ewing-Chow (n 133) 5; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 411.

¹⁶⁵ Van Harten, *Investment Treaty Arbitration and Public Law* (n 133) 63.

¹⁶⁶ I Suarez Anzorena, 'Consent to Arbitration in Foreign Investment Laws' in I Laird and T Weiler (eds), *Investment Treaty Arbitration and International Law* (JurisNet 2009) 64; Thomas and Ewing-Chow (n 133) 5.

¹⁶⁷ Brower and Schill (n 160) 490; Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 412.

¹⁶⁸ Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator'.

¹⁶⁹ As argued by the United States government, ITA disputes can be ‘distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties’. *Methanex Corporation v. United States of America* UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 [17]. See T Landau, 'Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration' in AJ Van Den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Wolters Kluwer 2009) 194.

ITA, in this sense, creates a legal order to support investment treaties¹⁷⁰ and may provide guidance for future arbitrations.¹⁷¹ Less focus is placed on party autonomy¹⁷² with policies being targeted instead towards, for example, greater transparency and third party involvement, evidenced by *amicus curiae* procedures.¹⁷³ Consistent decision making becomes of greater importance,¹⁷⁴ given the contribution that the arbitral award will make towards the legal framework of international investment law.¹⁷⁵ It is more probable that public interests will be factored into the decision making process as the arbitrator is likely to be aware that the consequences of the decision will extend beyond the parties to the dispute.¹⁷⁶ This holistic approach is encouraging for the acceptance of a human rights defence.

Deference to the sovereign aspects of a host state acting as a disputing party has been exhibited in ICSID awards, mainly evidenced by the manner in which an arbitral tribunal may defer to host state policy when balancing the interests of the foreign investor with the host state. This is demonstrated by the approach of the arbitrators in *Lemire v Ukraine*.¹⁷⁷ When interpreting the meaning of fair and equitable treatment, in light of the object and purpose of the treaty (as set out in the preamble to the BIT), the ICSID arbitral tribunal looked beyond the terms of the BIT and placed the preamble in a wider context, that of the economic development of the

¹⁷⁰ Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 408.

¹⁷¹ Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (n 139) 484.

¹⁷² Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 409.

¹⁷³ Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (n 139) 485.

¹⁷⁴ Such as through the use of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. See Wälde, 'Interpreting Investment Treaties: Experiences and Examples' (n 136).

¹⁷⁵ Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 409; Mills, 'The Public-Private Dualities of International Investment Law and Arbitration' (n 138) 101.

¹⁷⁶ Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 134) 409; Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective' (n 151) 225; Mills, 'The Public-Private Dualities of International Investment Law and Arbitration' (n 138) 102.

¹⁷⁷ *Joseph C. Lemire v. Ukraine* ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010

parties to the BIT.¹⁷⁸ When analysing the terms of the BIT in this wider context, the ICSID arbitral tribunal stated:

Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate rights of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.¹⁷⁹

Based on *Lemire v Ukraine*, it can be seen that the ‘public’ approach is more amenable to entertaining public policy considerations within ITA, especially those that affect the population of the host state. This approach takes into account state sovereignty and the purpose of the investment law regime more broadly. It is sympathetic to the consequences of the judgments in the wider sphere of public international law and the implications of the final awards rendered. As a result, a human rights based defence is more likely to be accepted when an arbitrator takes a ‘public’ outlook in relation to ITA.

When the Argentina decisions are viewed in light of the ‘private’ and ‘public’ approaches discussed above, it becomes clear that the approaches of the ICSID arbitral tribunals discussed, mirror the general positions set out above. Those awards that dismissed the relevance of human rights arguments reflect elements of a ‘private’ approach, whilst those that were more accepting of human rights arguments took a more ‘public’ stance. This difference represents a manifestation of regime conflict and leads to an inconsistent approach to decision making in ICSID arbitration. A ‘private’ conception of ITA stresses the investment focused, commercial aspects of ICSID arbitration, whereas a ‘public’ approach emphasises the beneficial aspects of FDI for the host state. Therefore, the introduction of a host state human rights defence within the existing structure of ICSID arbitration can be justified as a means of reconciling both approaches. To minimise regime conflict, and to encourage the ‘de-fragmentation’ of international investment law and international human rights law, a ‘public’ approach is clearly preferable. This approach permits an arbitral tribunal to consider the wider purpose of ICSID

¹⁷⁸ Ibid [272] – 273].

¹⁷⁹ Ibid [273].

arbitration within international investment law, and more broadly, public international law. By identifying the intersections between international investment law and, for example, international human rights law, the arbitral panel can attempt to reconcile these regimes, subject to the structural bias that pre-exists in ICSID arbitration.

Whilst parties to ICSID Arbitration have the opportunity to select individual arbitrators,¹⁸⁰ they are not in control of the manner in which the entire ICSID arbitral tribunal will approach its task. This conclusion does not assist in determining the desirable characteristics of a human rights defence *per se*. However, it does indicate that should a host state wish to run a human rights defence its legal basis will need to align as closely as possible with the ‘private’ approach to ITA, to prevent it from being precluded for being irrelevant by ICSID arbitral tribunals that favour this approach. Consequently, a host state human rights defence will need to be clearly established within the scope of the ICSID Arbitral Rules to strengthen its links to this conception of ITA. The alignment of the host state human rights defence with the ICSID Arbitral Rules also permits ICSID arbitral tribunals that prefer a ‘public’ stance to justify their approach by reference to ICSID arbitral practice. The specific foundation upon which the host state human rights defence will be based is considered in Part B of this thesis.

Even if the host state human rights defence can display ‘private’ characteristics by being based on the ICSID Arbitral Rules, there is no guarantee that individual arbitrators will accept a human rights defence. Despite this, if the defence is founded on a secure legal basis it is more likely to become mainstream within ICSID arbitration, which will help its cause in the long term.

3.3.4 Preliminary Conclusion

ICSID arbitral practice exhibits a reluctance, on behalf of both host states and some arbitrators, to engage with international human rights law. Host states are reluctant to raise defences based on international human rights law due to the risk of liability in both international investment law and international human rights law dispute resolution fora. The risk of potential liability in two fora is a direct result of systemic bias caused by the fragmentation of public international law. Arbitrators may be

¹⁸⁰ ICSID Rules of Procedure for Arbitration Proceedings Rules 3 and 4.

reticent to consider host state defences based on international human rights law given their perception of ICSID arbitration as a variant of ICA, which tends to be party driven. As a result, it ignores the wider implications of investment disputes, such as international human rights law. Whilst a ‘public’ approach to ITA is more amenable to international human rights law, there is no guarantee that arbitrators will adopt this approach. Consequently, a host state human rights defence will need to display characteristics that overcome these challenges.

It is acknowledged that the difficulties discussed in this section cannot be entirely eliminated. Yet, the risks can be minimised by applying a host state human rights defence strategically. Hence, the defence should only be applied in instances where the foreign investor has committed grave or persistent human rights violations. This limits the risk of dual liability for host states. Further, if host states refrain from overusing the defence, arbitrators more likely to be receptive to arguments based on international human rights law. The defence should also be used by host states when they are not implicated in the human rights violations. Its use in instances where the host state may be culpable would appear cynical and inflame the dispute with the affected host state population, increasing the risk of liability in both ICSID arbitration and human rights dispute resolution fora. Finally, to encourage arbitrators to adopt the defence, it should have a solid legal foundation in the ICSID Arbitral Rules. This will reduce the chances of arbitrators dismissing the defence for being outside of the scope of ICSID arbitration. In short, the widespread acceptance of a host state human rights defence is dependent upon the adoption of recognised and justifiable procedures that permit the incorporation of public interests into ICSID arbitration.

3.4 *AMICUS CURIAE* IN ICSID ARBITRATION

The adoption of procedures within ICSID arbitration to enable consideration of subjects such as international human rights law is not entirely novel. This section considers the potential impact of *amicus curiae* procedures in unifying international investment law and international human rights law in ICSID arbitration, and how this may intersect with a host state human rights defence.

Amicus curiae procedures in ICSID arbitration are designed to permit the introduction of public policy considerations before an arbitral tribunal by non-

disputing parties (*amicus curiae*).¹⁸¹ *Amicus curiae* can potentially influence ICSID arbitral proceedings by attending and making representations at oral hearings, filing written submissions and accessing documents on the arbitral file.¹⁸² Therefore, this procedure confers *amicus curiae* with the ability to highlight how international human rights law applies to an investment dispute. Consequently, *amicus curiae* procedures have the capacity to increase regime interaction, and as a result, ‘de-fragment’ international investment law and international human rights law. Thus, the manner in which *amicus curiae* procedures function is instructive for the operation of a host state human rights defence.

This section reviews the use of *amicus curiae* procedures in ICSID arbitration to identify the extent to which they can ‘de-fragment’ international investment law and international human rights law. The section proceeds in two stages. First, the procedural basis for the involvement of *amicus curiae* in ICSID arbitration is considered in order to determine the nature and scope of the role of *amicus curiae*. The second stage proceeds to appraise the application of *amicus curiae* procedures by ICSID arbitral tribunals. Conclusions are then drawn regarding the effectiveness of *amicus curiae* procedures as a means of unifying international investment law and international human rights law in ICSID arbitration. Finally, the implications of these findings for the proposed host state human rights defence are considered.

3.4.1 The Procedural Basis for *Amicus Curiae* in ICSID Arbitration

Although the role of *amicus curiae* is difficult to define with precision,¹⁸³ it can be described as:

... a practice, rather than an enshrined right, whereby arguments on points of law, or information, can be presented before the tribunal, with its permission and often by its active invitation, which would otherwise

¹⁸¹ L Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012) 1 Cambridge Journal of International and Comparative Law 208, 224 - 225.

¹⁸² ICSID Rules of Procedure for Arbitration Proceedings (n 180) Articles 32(2) and 37(2). The ICSID Arbitral Rules are silent regarding access to documents, however, recent ICSID practice has permitted this. These elements of *amicus curiae* participation are discussed in detail in section 3.4.2.

¹⁸³ J Bellhouse and A Lavers, 'The Modern *Amicus Curiae*: A Role in Arbitration?' (2004) 23 Civil Justice Quarterly 187, 187; K Fach Gómez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest' (2012) 35 Fordham International Law Journal 510, 516.

not be heard because they did not form part of the respective cases of the litigants represented.¹⁸⁴

In light of the strict party-driven nature of arbitration, ICSID arbitral tribunals were initially reluctant to permit the involvement of third parties in the guise of *amicus curiae*. Further, there was no clear procedural basis permitting the introduction of *amicus curiae* within the ICSID Arbitral Rules. However, as investment disputes differ to traditional ICA disputes due to the involvement of a host state as a disputing party, and as the host state population have an interest in the outcome of the award, a public interest element is present in ITA.¹⁸⁵ *Amicus curiae* procedures provide a means by which this public interest can be raised in investment disputes. Therefore, an *amicus curiae* role created a tension between the ‘private’ commercial origins of ICSID arbitration and the potential need for *amicus curiae* to outline the ‘public’ interest that may arise in the context of investment disputes.

The first petition for *amicus curiae* status in *Aguas Del Tunari S.A. v Republic of Bolivia*¹⁸⁶ was rejected as the ICSID arbitral tribunal focused on the party driven nature of ICSID arbitration.¹⁸⁷ In a letter from the President of the Tribunal, it was explained that:

The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration raise the control of the issue with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to the hearings to non-parties and, *a fortiori*, to the public generally; or the make the documents of the proceedings public.¹⁸⁸

Yet, the ICSID arbitral tribunals in *Aguas Argentinas S.A., Suez Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v the Argentine Republic* and *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v the Argentine*

¹⁸⁴ Bellhouse and Lavers (n 183) 190.

¹⁸⁵ Bastin (n 181) 226 – 227.

¹⁸⁶ A summary of the decision is available in *Aguas del Tunari, S.A., v. Republic of Bolivia* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005.

¹⁸⁷ Van Harten, *Investment Treaty Arbitration and Public Law* (n 133) 163.

¹⁸⁸ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition, 29 January 2003 [3].

Republic identified a need for the public interest to be presented in ICSID arbitration¹⁸⁹ and established *amicus curiae* procedures in response. To overcome the lack of any specific procedural rules addressing *amicus curiae*, the ICSID arbitral tribunals used the general power to govern arbitral procedure contained in Article 44 of the ICSID Convention¹⁹⁰.¹⁹¹ Therefore, after initial reluctance, the public interest was deemed to be significant enough to warrant the use of *amicus curiae* in ICSID arbitration.

In response to the lack of a clear mandate for *amicus curiae*, specific procedures governing *amicus curiae* were incorporated into the ICSID Arbitral Rules in 2006.¹⁹² This resulted in two amendments to the ICSID Arbitral Rules. The first related to the ability of *amicus curiae* to attend oral hearings. As a result, Article 32(2) ICSID Arbitral Rules was amended to read:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

ICSID Arbitral Rule 37(2) was also introduced, which permits non-disputing parties to act as *amicus curiae*¹⁹³ by filing written submissions. This provision reads:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter

¹⁸⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006.

¹⁹⁰ Article 44 of the ICSID Convention provides, in part, that 'If any question of procedure arises which is not covered by this Section of the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question'.

¹⁹¹ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* Order in Response to a Petition for Transparency and Participation as Amicus Curiae (n 189) [16]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* Order in Response to a Petition for Transparency and Participation as Amicus Curiae (n 189) [11] - [16].

¹⁹² For further details of the 2006 amendments to the ICSID Arbitral Rules, see A Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2007) 21 ICSID Review - Foreign Investment Law Journal 427.

¹⁹³ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* ICSID Case No. ARB/05/22, Procedural Order No. 5 on amicus curiae, 2 February 2007 [17] - [19].

within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

The provisions remain silent regarding whether *amicus curiae* have access to documents on the arbitral file.

The 2006 amendments to the ICSID Arbitral Rules indicate that the ‘public’ interest should be represented by *amicus curiae* in ICSID arbitration. Simultaneously, the additional rules reflect the tension between ‘private’ and ‘public’ interests in ICSID arbitration. Each provision requires that a balance be struck between the rights of the disputing parties and the *amicus curiae*. To achieve this balance, ICSID arbitral tribunals have emphasised that the role of an *amicus curiae* is to act ‘a volunteer, a friend of the court, not a party’.¹⁹⁴ Hence, *amicus curiae* are to assist the tribunal in its work.¹⁹⁵ As a result, *amicus curiae* should indirectly participate in ICSID arbitral proceedings to the extent that they represent an interest different to the parties¹⁹⁶ and can provide information relating to a matter

¹⁹⁴ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* Order in Response to a Petition for Transparency and Participation as Amicus Curiae (n 189) [13]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* Order in Response to a Petition for Transparency and Participation as Amicus Curiae (n 189) [13].

¹⁹⁵ A Kawharu, ‘Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae’ in M Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 291; E De Brabandere, ‘NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes’ (2011) 12 *Chicago Journal of International Law* 85, 106; E Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’ (2011) 29 *Berkeley Journal of International Law* 200, 207.

¹⁹⁶ *Bernhard von Pezold and others v. Republic of Zimbabwe* ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012 [49]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* ICSID Case No.

in dispute.¹⁹⁷ However, as *amicus curiae* still have the potential to significantly influence the manner in which ICSID arbitration is conducted,¹⁹⁸ the role of the *amicus curiae* in ICSID arbitration has been restricted in practice to protect the rights of the disputing parties.

To maintain the balance between the ‘public’ and ‘private’ interests represented by *amicus curiae* and the disputing parties respectively, ICSID arbitral tribunals are required to weigh several policy considerations to ensure that *amicus curiae* do not encroach on the rights of the disputing parties. When evaluating each policy consideration, ICSID arbitral tribunals are therefore able to control the manner in which *amicus curiae* are able to perform their functions. The extent to which an ICSID arbitral tribunal permits *amicus curiae* to act is determinative of the degree to which they may be able to contribute to furthering regime interaction between international investment law and international human rights law. It is submitted that the balancing of these policy considerations is more than likely to inhibit the ability of *amicus curiae* to introduce international human rights law into ICSID arbitration to the extent required to ‘de-fragment’ international investment law and international human rights law. This is illustrated by reference to four policy considerations.

First, ICSID arbitral tribunals need to ensure that *amicus curiae* only provide additional information to support the ICSID arbitral tribunal. In the event that *amicus curiae* exceed this function they are likely to take on the characteristics of a disputing party and influence how the actual disputing parties manage the investment dispute. For example, should *amicus curiae* written submissions be too encompassing, they may negatively affect a disputing party’s entire litigation strategy. The potential influence of *amicus curiae* submissions on the parties’ litigation strategies would undermine the party driven aspects of this form of dispute resolution.¹⁹⁹ Even the limited involvement of *amicus curiae* is likely to influence how disputing parties approach their submissions. For example, the disputing parties are likely to have to respond to *amicus curiae* submissions, which in turn, can affect

ARB/10/25, Procedural Order No. 2, 26 June 2012 [49]. See *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* ICSID Case No. ARB/05/22, Award, 24 July 2008 [359].

¹⁹⁷ Kawharu (n 195) 291; De Brabandere (n 195) 106 – 107.

¹⁹⁸ See the policy considerations listed below.

¹⁹⁹ Harrison (n 118) 405; T Ishikawa, ‘Third Party Participation in Investment Treaty Arbitration’ (2010) 59 International and Comparative Law Quarterly 373, 391.

the substance of their arguments.²⁰⁰ Thus, ICSID arbitral tribunals need to manage the conduct of the arbitration to make sure that *amicus curiae* do not usurp the role of the disputing parties by submitting novel arguments. Unless human rights based arguments have already been raised by the disputing parties there will be limited scope for *amicus curiae* to raise international human rights arguments within the ICSID arbitral proceedings.

Second, the introduction of *amicus curiae* submissions is likely to prolong the length and cost of ICSID arbitration.²⁰¹ This is because the disputing parties will need to wait for any *amicus curiae* submissions to be filed and will then need to respond to them.²⁰² ICSID arbitral tribunals can manage any delays by instituting clear procedures limiting the involvement of *amicus curiae*,²⁰³ such as ensuring that *amicus curiae* adhere to the arbitral timetable. However, as most *amicus curiae* submissions support the host state,²⁰⁴ the foreign investor is still likely to have higher costs opposing the introduction of *amicus curiae* and then responding to the claims.²⁰⁵ ICSID arbitral tribunals are aware of the potential burden that *amicus curiae* submissions have on the parties and try to accommodate this by limiting the length of *amicus curiae* submissions.²⁰⁶

Third, NGOs filing *amicus curiae* submissions may not be fully representative of civil society.²⁰⁷ In some instances, NGOs from the host state may

²⁰⁰ E Triantafilou, 'Amicus Submissions in Investor-State Arbitration after *Suez v. Argentina*' (2008) 24 *Arbitration International* 571, 577.

²⁰¹ Bastin (n 181) 225.

²⁰² K Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16 *Review of European Community and International Environmental Law* 230, 240; Levine (n 195) 219; Fach Gómez (n 183) 552 – 553.

²⁰³ Tienhaara (n 202) 240; J Delaney and D Barstow Magraw, 'Procedural Transparency' in PT Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), 781.

²⁰⁴ Harrison (n 118) 405.

²⁰⁵ P Friedland, 'The Amicus Role in International Arbitration' in LA Mistelis and JD Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 328.

²⁰⁶ C Knahr, 'Transparency, Third Party Participation and Access to Documents in International Investment Arbitration' (2007) 23 *Arbitration International* 327, 352 – 353; Ishikawa (n 199) 398. It has been suggested that if third participation is to serve the purpose it was intended to achieve, some guidance needs to be given to *amici* so that they can focus their submissions on the points that will be most relevant to the tribunal in light of the limits imposed on the length of submissions. See F Marshall, 'The Precarious State of Sunshine: Case Comment on Procedural Orders in the *Biwater Gauff (Tanzania) Ltd. v Tanzania* Investor-State Arbitration' (2007) 3 *International Journal of Sustainable Development Law and Policy* 181, 202 – 203.

²⁰⁷ A Mourre, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?' (2006) 5 *The Law and Practice of International Courts and Tribunals* 257, 266; Delaney and Barstow Magraw (n 203) 783; Harrison (n 118) 405 – 406.

struggle to finance the production of *amicus curiae* briefs.²⁰⁸ As a result, NGOs from developed states who have the financial capacity and expertise may drive *amicus curiae* submissions, and in doing so, not adequately represent the interests of the population of the host state.²⁰⁹ NGOs may also use *amicus curiae* proceedings to raise their profile and their legitimacy.²¹⁰ Although these risks are present, recent practice suggests that local NGOs actively participate in the formulation of *amicus curiae* briefs and have benefitted from collaborative efforts with NGOs from developed states.²¹¹ Nevertheless, ICSID arbitral tribunals need to take into account any external influence that may undermine the legitimacy of the *amicus curiae* submissions as an accurate reflection of the view of the host state population. Should too much weight be given to inaccurate *amicus curiae* submissions by an ICSID arbitral tribunal, this could unduly affect the outcome of the ICSID arbitration, undermining the rights of the disputing parties. This may result in the tribunal being wary of automatically accepting the contents of *amicus curiae* submissions.

Finally, the introduction of *amicus curiae* procedures has been argued to have the potential to politicise what was designed to be an apolitical form of dispute resolution through the introduction of public opinion.²¹² This is because *amicus curiae* submissions may advocate the particular cause of an NGO.²¹³ This may give rise to claims of partiality,²¹⁴ with the result being that the ICSID tribunal favours the host state's perspective²¹⁵ given that most submissions tend to support the host state's position. ICSID arbitral tribunals need to ensure that *amicus curiae* submissions do not skew the focus of the tribunal away from the investment dispute initiated by the disputing parties. Any bias can be countered by accepting arguments from a variety of *amici* in order to inform the analysis of the tribunal.²¹⁶ Even if a broad range of submissions are received, *amicus curiae* are always likely to have a

²⁰⁸ Delaney and Barstow Magraw (n 203) 783; Kawharu (n 195) 287; Fach Gómez (n 183) 551 – 552.

²⁰⁹ Kawharu (n 195) 287; Fach Gómez (n 183) 551 – 552.

²¹⁰ JE Viñuales, 'Human Rights and Investment Arbitration: the role of *amici curiae*' (2006) 8 *Revista Colombiana de Derecho Internacional* Bogota 231, 270; Ishikawa (n 199) 399.

²¹¹ Tienhaara (n 202) 241; Delaney and Barstow Magraw (n 203) 783.

²¹² N Blackaby and C Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in M Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010), 273; Levine (n 195) 220. C.f. Ishikawa (n 199) 399 'a dispute which involves important public issues, the risk of politicization always exists regardless of third party participation in the arbitration proceedings'.

²¹³ Tienhaara (n 202) 240; Triantafylou (n 200) 576.

²¹⁴ Triantafylou (n 200) 577.

²¹⁵ Fach Gómez (n 183) 551.

²¹⁶ Ishikawa (n 199) 400.

vested interest in the outcome of the ICSID award and, as such, their submissions are likely to be reviewed closely.

In conclusion, ICSID tribunals must ensure that *amicus curiae* fulfil their specialist remit without adopting the attributes of a disputing party. This results in *amicus curiae* not being able to initiate novel arguments, only being able to make a limited contribution to the proceedings and being scrutinised for bias and ulterior motives. Consequently, *amicus curiae* are unlikely to be given the opportunity to present substantiated arguments demonstrating the unity between international investment law and international human rights law. In the instances when international human rights law is raised by *amicus curiae*, it is likely to be considered to be a biased perspective. These factors inhibit the ability of *amicus curiae* to ‘de-fragment’ international investment law and international human rights law. This view is further supported by reference to the approach taken by ICSID arbitral tribunals that have applied these considerations.

3.4.2 The Application of *Amicus Curiae* Procedures in ICSID Arbitration

Since the amendment of the ICSID Arbitral Rules to encompass the role of *amicus curiae*, petitions for *amicus curiae* status have been raised in five ICSID awards.²¹⁷ Three of these awards have implications for the interaction of international investment law and international human rights law. The manner in which these three awards have dealt with each element of the *amicus curiae* procedure will be considered to identify how tribunals have viewed the role of *amicus curiae*. Each award discussed below has taken a distinctive approach with regard to the appropriate balance to be struck between the rights of the disputing parties and the rights of the *amicus curiae*. Focus will be placed on how each approach influences the ability of *amicus curiae* to introduce international human rights law into ICSID arbitration.

²¹⁷ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* ICSID Case No. ARB/07/22, Award, 23 September 2010; *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* ICSID Case No. ARB(AF)/07/1, Award 4 August 2010; *Bernhard von Pezold and others v. Republic of Zimbabwe* and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196).

The first approach taken by ICSID arbitral tribunals towards *amicus curiae* submissions can be classified as a moderate approach. This approach is characterised by ICSID arbitral tribunals permitting the introduction of *amicus curiae* into the arbitration process, but moderating the extent of their influence. This stance is evidenced in the *Biwater v Tanzania*²¹⁸ award.

In the *Biwater v Tanzania* award, a dispute arose between Biwater and Tanzania regarding a privatised water and sewerage infrastructure project in Dar es Salaam.²¹⁹ The dispute centred on the foreign investor's compliance with the terms of the investment contract,²²⁰ which had implications for their ability to provide affordable water to the local population.²²¹ In November 2006, five petitioners applied for *amicus curiae* status.²²² The submissions presented focused on the inability of the local population to access to water and, it was argued, raised international human rights concerns.²²³ The petitioners sought to attend the arbitral hearing, make written submissions regarding the international law human rights implications of the decision and to access documents on the arbitral file.²²⁴

The claimant objected to the petitioners attending the hearing.²²⁵ This precluded the attendance of non-disputing parties at the hearings in accordance with the amended form of Rule 32(2).²²⁶ However, the tribunal considered that it would benefit from written arguments submitted in accordance with Rule 37(2).²²⁷ This decision was justified by reference to the need to secure 'wider confidence in the arbitral process itself'.²²⁸ The tribunal emphasised that no procedural order would be

²¹⁸ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* Award (n 217).

²¹⁹ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* Award (n 217) [1] – [17].

²²⁰ *Ibid* [14] – [16], [96] – [228].

²²¹ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* Amicus Curiae Submission <http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf> accessed 10 July 2013 [3] – [6].

²²² The Petitioners consisted of the Lawyers' Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme, the Center for International Environmental Law; and the International Institute for Sustainable Development.

²²³ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* Amicus Curiae Submission (n 221) [15] – [53].

²²⁴ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* Procedural Order No. 5 on amicus curiae (n 193) [16] – [30].

²²⁵ *Ibid* [41].

²²⁶ *Ibid* [71].

²²⁷ *Ibid* [50].

²²⁸ *Ibid*.

made ‘which might unduly burden any party in their preparation for the forthcoming hearing, or indeed jeopardise the hearing itself’.²²⁹

When utilising Rule 37(2), the petitioners argued that the impact of a confidentiality order prohibiting the release of several categories of documents, prevented them from determining the precise scope of the legal submissions that they intended to submit.²³⁰ As a result, they sought a review of the terms of the confidentiality order, to enable them to draft tailored submissions based on documents on the arbitral file.²³¹ The Tribunal considered that the role of the petitioners was to ‘address broad policy issues concerning sustainable development, environment, human rights and governmental policy’.²³² As the dispute had been ‘very public and widely reported’,²³³ the Tribunal decided that sufficient information was already in the public domain.²³⁴

In reaching these decisions, where possible, the *Biwater* tribunal took a balanced view with regard to the role of *amicus curiae* and the contribution that they should make to ICSID arbitration. When considering whether *amicus curiae* are able to attend and present at oral hearings, an ICSID arbitral tribunal is not conferred with any discretion. Rule 32(2) ICSID Arbitral Rules, even as amended, permits parties to ICSID arbitration preventing *amicus curiae* from attending the hearing. As at least one disputing party’s interests will not align with that the *amicus curiae*, in most instances, *amicus curiae* will not be able to attend the oral hearings. Hence, the terms of Rule 32(2) favour a party driven perception of ICSID arbitration.

In contrast, the terms of Article 37(2) ICSID Arbitral Rules provide that the public and private aspects of ICSID arbitration are to be balanced by the ICSID arbitral tribunal. In achieving this balance in *Biwater*, the ICSID arbitral tribunal justified *amicus curiae* participation, in part, on the need for greater confidence in ICSID arbitration. Once the introduction of *amicus curiae* was established, the tribunal subsequently sought to protect the rights of the disputing parties by not placing excessive burdens on the disputing parties and maintaining the existing

²²⁹ Ibid.

²³⁰ Ibid [19].

²³¹ Ibid [25] – [27].

²³² Ibid [64].

²³³ Ibid [65].

²³⁴ Ibid.

confidentiality orders.²³⁵ The tribunal also sought to rely on the general expertise of the *amicus curiae*, rather than requiring them to respond to specific arguments or issues in dispute. This moderated approach accords with the limited role intended for *amicus curiae* in ICSID arbitration.

The final award in *Biwater* is indicative of the extent to which *amicus curiae* submissions influenced the outcome of the decision, especially with regard to the unification of the international investment law and international human rights law regimes.²³⁶ Briefly referring to the *amicus* submissions, the *Biwater* final award notes:

the Arbitral Tribunal has found the *Amici's* observations useful. Their submissions have informed the analysis of the claims set out below, and where relevant, specific points arising from the *Amici's* submissions are returned to in that context.²³⁷

Reference is made to the *amicus* submissions in paragraph 601, where the tribunal confirmed that it had:

taken into account the submissions of the Petitioners, as summarised earlier, which emphasise countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct; the limit to legitimate expectations in circumstances where an investor itself takes on risks in entering a particular investment environment; and the relevance of the parties' respective rights and obligations as set out in any relevant investment agreement (here the Lease Contract).

The only other reference to the *amicus* submissions is in footnote 208 explaining a discrepancy between the position taken by the *amici* and the position established by the parties before the tribunal. This was attributed to the *amici* not having access to the relevant documentation.

Given the limited extent to which the ICSID tribunal in *Biwater* refers to the *amicus curiae* submissions, it is easy to infer that little attention was paid to their arguments. No express reference is made to the specific points raised by the *amicus curiae*. However, it is probable that the *amicus curiae* submissions provided background information to the tribunal that informed their interpretation of the IIA.

²³⁵ See Marshall (n 206) 197.

²³⁶ See Harrison (n 118) 411 – 412.

²³⁷ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* Award (n 217) [392].

The role of *amicus curiae* is not to present arguments in response to the disputing parties and, consequently, their arguments are unlikely to feature strongly within the award. The statements of the tribunal suggest that it considered the submissions of the *amicus curiae* in the manner intended by the ICSID Arbitral Rules. That is, they were taken into account, but were not highly influential. This stance reflects the moderated position with regard to the use of *amicus curiae* submissions taken in this award, and simultaneously highlights the limitations of *amicus curiae*. They do not present arguments, and at most, their influence on the ICSID arbitral tribunal is limited to providing a relevant context. In light of the *Biwater* award, *amicus curiae* are unable to unify international investment law and international human rights law to the degree required to counter the current extent of regime conflict.

A second approach to *amicus curiae* procedures is one that is inclusive and supportive of *amicus curiae* involvement in ICSID arbitration. This approach stresses the importance of the public interest in ITA and seeks to formulate a final award that reflects the broader context in which the decision is being made. By taking this stance, the tribunal in *Piero Foresti v South Africa*²³⁸ established a more conducive environment for the acceptance of *amicus curiae*.

The *Piero Foresti v South Africa* hearings arose when Italian and Luxembourg investors commenced ICSID arbitral proceedings against South Africa in relation to the alleged expropriation of mining rights, relying on ICSID's Additional Arbitration Rules.²³⁹ Little documentation from the dispute was made public, but the foreign investors appear to have argued that South Africa's requirement that mining licences be re-issued under the Mining and Petroleum Resources Development Act 28 of 2002 (MPRDA) had resulted in breaches of South Africa's BITs with Italy and Benelux.²⁴⁰ The re-issuing of licences was to comply with anti-discrimination policies, including South Africa's Black Economic

²³⁸ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* (n 217).

²³⁹ *Ibid* [1].

²⁴⁰ *Ibid* [56] – [57]. See LE Peterson, 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights' (2006) Friedrich-Ebert-Stiftung 17; M Coleman and K Williams, 'South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: A Fragmented Regime?' (2008) 9 Business Law International 56, 76; MW Chow, 'Discriminatory Equality v. Nondiscriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies Under International Law' (2009) 24 Connecticut Journal of International Law 291, 336 – 338; A Wythes, 'Investor-State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?' (2010) 23 Leiden Journal of International Law 241, 243 – 244.

Empowerment programme.²⁴¹ Petitions were received from potential *amicus curiae* justifying their involvement on the basis of the foreign investor's challenge to the MPRDA, which was intended to redress the racial inequalities resulting from apartheid.²⁴² In this context, there was clear potential for the international human rights law raised by the *amici* to be of relevance to the ICSID tribunal, and for international human rights law to be considered as an integral part of the ICSID arbitration. However, the claim was settled before *amicus curiae* submissions were presented. Despite this, the manner in which the ICSID tribunal addressed the request is still instructive.

In a letter to the parties dated 5 October 2009, the ICSID Secretariat indicated the tribunal's decision to accept the *amicus curiae* petitions. The letter set out the Tribunal's reasoning, which took into account two basic principles. The first was that the role of *amicus curiae* is 'to give useful information and accompanying submissions to the Tribunal'²⁴³ rather than it being a 'mechanism for enabling NDP's to obtain information from the Parties'.²⁴⁴ Secondly, when *amicus curiae* are permitted to participate in ICSID arbitration 'the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process'.²⁴⁵ This approach reiterates both the limited role of the *amicus curiae*, and the potential impact upon disputing parties that may be caused once *amicus curiae* have been given permission to file written submissions as part of the ICSID arbitration. Yet, in contrast to *Biwater*, the *Piero* award took the view that:

the NDP's must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDP's to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.²⁴⁶

This order was made despite the objections of the claimants to the release of documentation to third parties. The Tribunal further stated:

²⁴¹ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* (n 217) [56], [64].

²⁴² See ITA Law, 'Petition for Amicus Curiae Status' <<http://italaw.com/documents/ForestivSAPetition.pdf>> accessed 10 July 2013.

²⁴³ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009 [2.1].

²⁴⁴ *Ibid*

²⁴⁵ *Ibid* [2.2].

²⁴⁶ *Ibid* [3].

In view of the novelty of the NDP procedure, after all submissions, written and oral, have been made the Tribunal will invite the Parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal will then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it.²⁴⁷

The Tribunal in *Piero* did not anticipate that the *amicus curiae* would be able to attend the hearings, but a final decision did not need to be made by the disputing parties at that time.²⁴⁸

The approach of the tribunal in *Piero* highlights an attitude that is more supportive of the active participation of *amicus curiae* in ICSID arbitration than that of the tribunal in the *Biwater* award. This conclusion is based on the tribunal seeking to determine the extent to which disclosing the arbitral file is both detrimental to the disputing parties, and beneficial to the formulation of *amicus curiae* submissions. Hence, the ICSID arbitral tribunal potentially foresaw a greater involvement for *amicus curiae* in ICSID arbitrations, subject to the outcome of the review process. As the claim settled, this review was never undertaken and the position of the tribunal on the matter remains unknown. Nonetheless, although not in the context of international human rights law, in *Electrabel v Hungary*,²⁴⁹ the European Commission, acting as *amicus curiae*, was given access to documents on the arbitral file.²⁵⁰ This may be indicative of a new approach by ICSID arbitral tribunals regarding the balance to be struck between protecting the rights of the disputing parties and *amicus curiae*. Should *amicus curiae* be given access to documents, this may increase the specificity of *amicus curiae* submissions, resulting in tribunals taking more account of their content. If this trend were to be established, it would indicate a more ‘public’ stance towards ITA, enabling greater integration between international investment law and international human rights law.

The final approach to *amicus curiae* procedures is one that seeks to favour the ‘private’ approach to ITA. It focuses on the party-driven nature of arbitration by

²⁴⁷ Ibid [6].

²⁴⁸ Ibid [4].

²⁴⁹ *Electrabel S.A. v. Republic of Hungary* (n 217).

²⁵⁰ Ibid [5.6].

minimising the influence of *amicus curiae* in ICSID arbitration, as demonstrated by the *Pezold v Zimbabwe*²⁵¹ and *Border Timbers Ltd v Zimbabwe*²⁵² awards.

In *Pezold v Zimbabwe* and *Border Timbers Ltd v Zimbabwe*, Swiss and German investors initiated a joint arbitration under BITs with Zimbabwe. The claims were made in response to the Land Reform Programme undertaken by Zimbabwe.²⁵³ The foreign investors sought unencumbered legal title and control over land that had allegedly been expropriated, known as the Border Properties.²⁵⁴ The German based European Center for Constitutional and Human Rights and four communities of the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples who occupy the region of Chimanimani, where the Border Properties are located,²⁵⁵ sought permission to make written submissions, access documents on the arbitral file and attend oral hearings.²⁵⁶

When considering the operation of Arbitral Rule 37(2), the tribunal read into Arbitral Rule 37(2)(a) a requirement that petitioners should be independent of the disputing parties.²⁵⁷ In this instance, the *lack* of independence of the *amici* was established on two grounds. First, the interests being pursued by the *amici* ‘appear to be in conflict with the Claimants’ primary position in these proceedings’.²⁵⁸ Second, the involvement of an NGO in the creation of the petition, who had openly supported Zimbabwe’s land reform policies, was considered to ‘give rise to legitimate doubts’

²⁵¹ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196).

²⁵² *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196).

²⁵³ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [51]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [51]; LE Peterson, 'Zimbabwe facing treaty claims arising out of land reform programme' International Institute for Sustainable Development <http://www.iisd.org/pdf/2005/investment_investsd_jan21_2005.pdf> accessed 11 July 2013.

²⁵⁴ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [51]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [51].

²⁵⁵ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [16] - [18]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [16] - [18].

²⁵⁶ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [14]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [14].

²⁵⁷ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [49]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [49].

²⁵⁸ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [51]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [51].

regarding the independence of the petitioners.²⁵⁹ Whilst recognising that ‘it may therefore well be that the determination of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities’,²⁶⁰ their lack of independence precluded representatives of these communities from being conferred with *amicus curiae* status.²⁶¹

The tribunal also expressly considered the relationship between international investment law and international human rights law. They prefaced their analysis of this issue by stating that ‘the reference to “such rules of general international law as may be applicable” in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under BITs’.²⁶² On this basis, the ICSID arbitral tribunal dismissed the applicability of international human rights law, including international human rights law relating to indigenous peoples, as the parties had not raised these rights as part of the proceedings. The tribunal concluded that, as the petitioners had not established the interdependence of these regimes,²⁶³ references to international human rights law exceeded the mandate of the tribunal both under the ICSID Convention and the applicable BIT.²⁶⁴

The reasoning of the tribunal gives rise to two complicating factors when addressing the intersection of international investment law with international human rights law within the context of *amicus curiae* submissions. First, this tribunal interprets the notion of independence in a very restrictive manner. All *amicus curiae* petitioners seek to pursue and develop a particular aspect of the dispute. Consequently, they are likely to have links to either the foreign investor or the host

²⁵⁹ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [56]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [56].

²⁶⁰ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [62]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [62].

²⁶¹ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [62]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [62].

²⁶² *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [57]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [57].

²⁶³ *Bernhard von Pezold and others v. Republic of Zimbabwe* [58]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* [58].

²⁶⁴ *Bernhard von Pezold and others v. Republic of Zimbabwe* (n 196) [59]; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (n 196) [59].

state, by virtue of a vested interest. Whereas previous tribunals have addressed this bias as part of the submission process, in this decision, the tribunal denied all access to the petitioners from the outset. The ICSID arbitral tribunal failed to recognise the inherent bias that is present in all *amicus curiae* requests. Their subsequent denial of the request could inhibit the introduction of all *amicus* submissions and undermine Articles 32(2) and 37(2) of the ICSID Arbitral Rules.

Secondly, the attitude of the tribunal fails to take into account any intersection between international human rights law and the investment that forms the subject matter of the dispute. The connection between indigenous rights and the alleged violations of the IIA in this dispute, and the link between the human rights of the population in *Biwater* and the alleged violations of the IIA in that case, are directly comparable. In both instances, the impact of the investment directly affected the human rights of a sector of the host state population. In neither case did the host state raise human rights within its defence. As a result, there does not appear to be any basis on which to distinguish these decisions. The key factor that contributed to a distinction being drawn is the importance that is placed on the ‘private’ and commercial procedural origins of ITA in *Pezold*.

The *Pezold* award illustrates the influence of a ‘private’ approach to ITA. This stance results in tribunals taking a restrictive position and limiting their mandate accordingly. Such an approach inhibits the ability of *amicus curiae* procedures to effectively integrate international investment law and international human rights law, as they are denied any form of contribution to the ICSID arbitral proceedings.

When reviewed together, the awards discussed above establish the manner in which the ICSID provisions on *amicus curiae* procedures have been interpreted and applied by different ICSID arbitral tribunals. Despite applying identical terms set out in Rules 32(2) and 37(2) of the ICSID Arbitral Rules, by focusing on different aspects of the policy considerations, and the role of ICSID arbitration more generally, there is a significant difference in the approach of the tribunals. This variance highlights the difficulties faced by tribunals when trying to balance the nature of the *amicus* role with the rights of the disputing parties.

ICSID Rule 32(2), by conferring upon the parties the ability to exclude *amicus curiae* from oral hearings, favours the conduct of arbitration over the ability of *amicus curiae* to participate in the proceedings. This reflects both respect for the rights of the parties to the dispute, and the limited nature of the role of an *amicus curiae*. This restriction is indicative of the balance required between the ‘private’ and ‘public’ approaches to ICSID arbitration.

Article 37(2) of the ICSID Arbitration Rules indicates that tribunals are not generally opposed to admitting *amicus curiae* provided that they are sufficiently independent, and a public interest is involved that justifies the additional burden on the disputing parties. However, the decision in *Pezold* indicates that some tribunals will apply the provisions in a restrictive manner. As this is the first decision to deny *amicus curiae* status under the ICISD Arbitral Rules, it is unclear whether the position taken by the *Pezold* tribunal is indicative of a wider trend. Nonetheless, this stance evidences that the initial acceptance of *amicus curiae* may not be a widespread as initially thought.

In the event that *amicus curiae* establish a public interest that justifies their involvement in the ICSID arbitration, the additional burden on the disputing parties is factored into the conduct of the arbitral proceedings. This approach illustrates that when ICSID tribunals believe they have a clear mandate, they are generally willing to accept aspects of the public approach into ICSID arbitration. This has the potential to result in public policy based claims, such as international human rights law, into ICSID arbitration. Nonetheless, private conceptions of ITA become prioritised after the initial acceptance of *amicus curiae*.

Although tribunals were initially reluctant to provide access to the arbitral file to *amicus curiae*, the *Piero Foresti* decision, and its subsequent adoption in later awards, indicates that some tribunals may be willing to change this stance. Should this be the case, there may be greater scope for *amicus* to influence ICSID tribunals with international human rights law. Still, the ability of such an approach to achieve this is yet to be tested.

The application of the *amicus curiae* procedure differs between these tribunals. Whilst some are more open to the involvement of *amicus curiae* than others, all approaches are limited by the specialist nature of an *amicus curiae*’s role.

As a result of the limitations placed on their role, by both ICSID arbitral tribunals and the ICSID Arbitral Rules, *amicus curiae* do not possess the freedom of a disputing party within ICSID arbitration, which limits their ability to unify international investment law and international human rights law. In contrast, a host state human rights defence can fulfil this role.

3.4.3 The Implications of *Amicus Curiae* Procedures for a Host State Human Rights Defence

Amicus curiae procedures in ICSID arbitration have the potential to increase the unity between international investment law and international human rights law. This is because *amicus* may introduce international human rights law into ICSID arbitration. Several disputes to date have lent themselves to the submission of *amicus curiae* briefs. However, the potential to unify these regimes is curtailed by the specific nature of their role.

The role of *amicus curiae* is to advise the ICSID arbitral tribunal on general considerations that may have a bearing on the dispute. *Amicus curiae* are not parties to the proceedings, and as such cannot introduce new arguments or evidence. Further, the rights and interests of the parties who have selected ICSID arbitration as their preferred dispute resolution forum need to be protected. This results in policy considerations being applied to ensure that *amicus curiae* have a limited role and do not negatively influence either the rights of the parties or the credibility of ICSID arbitration. Consequently, the curtailed role of *amicus curiae* inhibits the full introduction of international human rights law in the manner that may be achievable with a host state human rights defence.

It is not suggested that the role of *amicus curiae* should not exist. *Amicus curiae* perform an important and legitimate function in ICSID arbitration. Without *amicus curiae*, public policy aspects of claims may not be brought to the attention of ICSID tribunals. This is vital when the local population of the host state is affected and the impact of the investment on their rights is not being voiced by the host state. However, given the existing framework of ICSID arbitration, *amicus curiae* can only achieve so much. As such, for the purposes of this thesis, *amicus curiae* are considered to perform an important, but supplementary role to that of the host state human rights defence.

Therefore, it is submitted that to effectively unify international investment law and international human rights law, a party initiated host state human rights defence is the most appropriate mechanism. A host state human rights defence can be supplemented by *amicus curiae* submissions to ensure that ICSID tribunals are fully aware of the materials required to inform their decision, and in this manner, *amicus curiae* and host state human rights defence can interact to reduce the fragmentation of international investment law and international human rights law.

3.5 JUSTIFICATIONS FOR A HOST STATE HUMAN RIGHTS DEFENCE

This chapter has identified regime conflict between international investment law and international human rights law in the instruments establishing the international investment law regime, within ICSID arbitral practice addressing human rights defences and in ICSID's *amicus curiae* procedures. By undertaking this analysis, the barriers that prevent the full integration of international human rights law into ICSID arbitration have become evident. This has resulted in the dismissal of some potential avenues for resolving the conflict between international investment law and international human rights law. However, it has also illustrated what attributes are desirable in order to enable a host state human rights defence to function in ICSID arbitration. This section will conclude this chapter by referring to manifestations of the regime conflict between international investment law and international human rights law, how regime conflict justifies the introduction of a host state human rights defence into ICSID arbitration and what characteristics it should possess in order to operate effectively.

Regime conflict between international investment law and international human rights law is seen in a variety of contexts. This chapter has demonstrated the existence of regime conflict by reference to the inclusion of international human rights law provisions in IIAs, ICSID arbitral practice in response to human rights based arguments and the extent to which *amicus curiae* procedures enable the integration of these regimes through the introduction of international human rights law by third parties.

The broadest conception of regime conflict is that generated by the creation of *lex specialis* regimes. These regimes display a singular focus that excludes the

application of relevant principles that are externally sourced from other *lex specialis* regimes. This level of regime conflict is illustrated by the operation of international human rights law provisions contained in IIAs. Although a small minority of IIAs refer to international human rights law (when environmental and labour standards are included in this definition) this practice is not widespread. Further, when included, provisions addressing international human rights law do not have parity with international investment law, either in terms of their legal strength, or ability to be raised in formal dispute resolution proceedings. The structural bias inherent in international investment law at this level leads to fragmentation and regime conflict between international investment law and international human rights law.

A second level of regime conflict occurs when states attempt to simultaneously comply with competing obligations sourced in differing *lex specialis* regimes. When attempting to comply with both international investment law and international human rights law, host states are placed in the difficult situation of potentially admitting liability in human rights dispute resolution fora when relying on international human rights law to defend their conduct in ICSID arbitration. Consequently, the failure of international investment law to accommodate international human rights law, and to consider its wider social impact, may cause regime conflict on a secondary level.

Finally, procedural limitations within ICSID arbitration giving rise to regime conflict are evidenced both in relation to the distinction between ‘public’ and ‘private’ styles of arbitration, and the limitations imposed as part of *amicus curiae* procedures. The division of ICSID arbitration into ‘private’ and ‘public’ approaches, determined by the arbitrators’ understanding of their function, can either permit or preclude the inclusion of international human rights law considerations in ICSID awards. *Amicus curiae* procedures reflect aspects of the division between ‘public’ and ‘private’ approaches to ICSID arbitration, in addition to limiting the involvement of *amicus curiae* to the essential aspects required so that they can perform their unique function. This denies *amicus curiae* the possibility of integrating international human rights law within ICSID arbitration to the degree required to counter the effects of fragmentation. These procedural limitations, whilst supporting international investment law, prevent international human rights law from

being comprehensively introduced into ICSID arbitration, potentially leading to regime conflict.

In each of these instances, the regime conflict encountered has been epitomised by broad conceptions of ‘public’ and ‘private’ interests in international investment law. In generalised terms, a ‘public’ approach is supportive of the inclusion of international human rights law within the international investment law regime given the wider social impacts of investment projects. In contrast, a ‘private’ approach seeks to solely consider the economic aspects of investment and prioritises the international investment law regime over other *lex specialis* regimes sourced from public international law. The management of regime conflict is currently achieved by trying to create equilibrium between these interests.

The use of such a vague approach to managing regime conflict justifies the introduction of a host state human rights defence into the ICSID arbitration process, primarily because the current role of international human rights law within ICSID arbitration remains unclear. Some arbitral tribunals appear to be receptive to ‘public’ interests such as international human rights law being introduced into ICSID arbitration, whilst others have rejected such an approach. This is illustrated by reference to how ICSID arbitral tribunals dealt with Argentina’s human rights based arguments following the 2001/2002 financial crisis. It is also evident in the distinct manner in which different tribunals have applied policy considerations when balancing the role of *amicus curiae* with disputing parties. As a result of the unclear role of international human rights law, ICSID arbitral tribunals are producing inconsistent results based on an arbitrary balancing of ‘public’ and ‘private’ considerations. Given a systemic understanding of public international law, both ‘public’ and ‘private’ aspects of investment disputes are relevant and should be applied with equal merit.

On this basis, a formalised procedure governing the use of international human rights law within the international investment law regime is required. A host state human rights defence has the potential to provide a structured, formal means by which a host state can raise arguments based on international human rights law in ICSID arbitration. This approach would minimise the variable nature of balancing ‘private’ and ‘public’ considerations by ICSID arbitral tribunals. In light of the

nature of the regime conflict outlined in this chapter, to function in this manner, a host state human rights defence will need to display specific characteristics.

In light of the political difficulties of balancing ‘public’ and ‘private’ aspects of international investment law within IIAs, and their current structural bias towards international investment law, the inclusion of an express provision in IIAs establishing a host state human rights defence is unlikely to be accepted. Therefore, this approach will not be considered in this thesis. The consequence of taking this position is that a host state human rights defence will need to be established as part of ICSID arbitral practice.

A trend evident in ICSID arbitral practice is that a host state human rights defence can be more readily established when ICSID arbitrators adopt a ‘public’ approach, rather than a ‘private’ approach to ICSID arbitration. However, more arbitrators tend to adopt a ‘private’ approach. Consequently, to encourage arbitrators to adopt a host state human rights defence, it must be tailored to a ‘private’ approach to readily permit its inclusion in ICSID arbitration. A ‘private’ approach will make it more difficult for arbitrators to dismiss its relevance. Further, the introduction of international human rights law by a party to the dispute, within a clearly defined structure, means that the regime conflict outlined above is more likely to be resolved in a logical and consistent manner.

A human rights defence must overcome problems of host state reluctance caused by the risk of dual liability. This requires that a host state human rights defence should only be used in limited instances and argued in a manner that is sensitive to those affected by the human rights violations. It is contended that a human rights defence should only operate in cases of either grave human rights breaches or persistent human rights breaches. This results in host states only needing to consider whether to bring a human rights defence in very limited circumstances. Further, host states can argue that the conduct of the foreign investor is the cause of the human rights obligation, rather than the investment itself. By taking the approach of attributing the breach to the foreign investor (if this is possible) this deflects attention away from potential claims that the host state is violating its human rights. If a human rights defence is successful, it demonstrates that the host state acted in

the best interests of the host state population in breaching the IIA, thereby preventing claims in human rights fora.

A human rights defence should augment existing *amicus curiae* procedures. Existing *amicus curiae* procedures, although unable to ‘de-fragment’ international investment law and international human rights law independently, do provide ICSID arbitral tribunals with the necessary context to enable arbitrators to apply the defence, and thereby support a host state human rights defence.

Should a host state human rights defence display these characteristics, it will be able to respond to the barriers that currently prevent regime interaction. In doing so, a host state human rights defence should be able to prevent regime conflict and successfully ‘de-fragment’ international investment law and international human rights law. Having established the characteristics required by a host state human rights defence; being (1) that the defence needs to be established beyond the terms of an IIA; (2) it must form part of ICSID arbitral practice; (3) it should avoid dual liability for host states; and (4) it should augment *amicus curiae* procedures; the next Part of this thesis considers the potential legal foundations for the defence that may meet these requirements.

PART B

THE LEGAL FOUNDATIONS OF A HOST STATE

HUMAN RIGHTS DEFENCE WITHIN ICSID

ARBITRATION

4. A PROCEDURAL HOST STATE HUMAN RIGHTS DEFENCE IN ICSID ARBITRATION

4.1 INTRODUCTION

A potential foundation for a host state human rights defence is to use procedural grounds to prevent a foreign investor from utilising ICSID arbitration. The jurisdictional limitations imposed upon ICSID arbitration provide a prospective framework upon which a procedural defence could be established. ICSID tribunals do not possess plenary jurisdiction.¹ ICSID arbitration was established to provide an apolitical forum for the resolution of FDI disputes.² Consequently, the jurisdictional limits of ICSID arbitration reflect this specialist remit and are designed to ensure that ICSID tribunals focus on investment disputes.³ Despite its international investment law focus, the jurisdiction of an ICSID arbitral tribunal over international investment law matters is not absolute.⁴ The disputing parties must meet specified criteria before the jurisdiction of an ICSID arbitral tribunal is established.

This chapter considers the potential avenues by which arguments based on international human rights law could deny the jurisdiction of an ICSID arbitral tribunal. It utilises the limited scope of an ICSID arbitral tribunal's jurisdiction, and the pre-conditions for its exercise, to consider how a procedural host state human rights defence could be created. In taking this stance, this chapter emphasises the fundamental roles of party consent, international public policy and subject matter jurisdiction within ICSID arbitration. It assumes that all other jurisdictional elements required for ICSID arbitration to operate have been met. It is posited that, whilst a host state human rights defence could potentially be established in certain circumstances by excluding an ICSID arbitral tribunal's jurisdiction on procedural grounds, both legal hurdles and policy considerations limit the desirability of adopting this approach.

¹ C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 370.

² ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States' <<https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>> accessed 15 July 2013 (Report of Executive Directors) [11].

³ This structure contributes to the regime conflict considered in Chapter 2.

⁴ See Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 144.

To consider this argument, this chapter initially considers the jurisdictional foundations of ICSID arbitration by reference to the terms of the ICSID Convention and party consent. These operate in tandem to limit the scope of originating claims that can be heard by an ICSID arbitral tribunal.⁵ This discussion outlines the jurisdictional limitations that form the basis of ICSID arbitration and acts as a reference point when subsequently evaluating the procedural options for a host state human rights defence. Initially, the operation of ‘in accordance with host state law’ clauses is considered as a means of denying the jurisdiction of the ICSID tribunal. Recent ICSID jurisprudence regarding the operation of ‘in accordance with host state law’ clauses indicates that illegal conduct by a foreign investor may constrain an ICSID arbitral tribunal’s jurisdiction.⁶ Therefore, these clauses could be effective in precluding an ICSID tribunal’s jurisdiction if the foreign investor has violated international human rights law that simultaneously breaches host state law. The role of international public policy is examined as a second means of denying jurisdiction. International public policy considerations can impact the admissibility of claims and can result in an ICSID tribunal electing not to hear a foreign investor’s claim, even though it has jurisdiction over the dispute.⁷ Should human rights violations be considered to amount to a breach of international public policy, ICSID tribunals could decide not to exercise their jurisdiction to hear the foreign investor’s claims. As both of these approaches would preclude a foreign investor access to a hearing on the merits before an ICSID arbitral tribunal,⁸ the policy implications of adopting a procedural host state human rights defence are examined before conclusions are drawn. Throughout this chapter, reference is made to the desirable characteristics of a host state human rights defence identified in Part A of this thesis. In particular, focus is placed on the legal foundation for the host state human rights defence given that it needs to comply with a positivist conception of public international law and demonstrate a credible legal basis.

⁵ Ibid.

⁶ See for example, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 [255]; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 [317].

⁷ See J Paulsson, ‘Jurisdiction and Admissibility’ in G Aksen and R Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (International Chamber of Commerce 2005).

⁸ Douglas (n 4) 135.

4.2 LIMITATIONS ON THE JURISDICTION OF AN ICSID ARBITRAL TRIBUNAL

Prior to considering the potential use of the jurisdictional limits of ICSID arbitration to establish a procedural host state human rights defence, this section considers the manner in which ICSID jurisdiction is established, and the features that limit its scope.

The jurisdiction of a dispute resolution body commonly refers to its authority to adjudicate a claim.⁹ However, ICSID is not a dispute resolution body and only exercises administrative functions in support of ICSID arbitrations.¹⁰ The ICSID Convention does provide a framework in which ICSID arbitrations operate, but the criteria it sets out are to be applied by individually constituted arbitral tribunals, rather than ICSID itself.¹¹ As a result, the use of the term ‘jurisdiction’ in the ICSID Convention refers to the pre-conditions that must be met before ICSID will provide any supporting functions to arbitral proceedings.¹² Once a dispute is within the bounds of the ICSID Convention, the consent of the parties determines the precise scope of the subject matter of the dispute that will be dealt with by the appointed arbitral tribunal.¹³ Therefore, the jurisdiction of an ICSID arbitral tribunal is dictated by both the terms of the ICSID Convention and the consent given by the disputing

⁹ A Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 295; G Zeiler, 'Jurisdiction, Competence and Admissibility of Claims in ICSID Arbitral Proceedings' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 78; R Moloo and A Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 43 *Fordham International Law Journal* 1473, 1491.

¹⁰ Article 1 ICSID Convention states ‘the purpose of the Centre shall be to provide facilities for conciliation and arbitration’. See A Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 166; Zeiler (n 9) 79 – 80; *Wintershall Aktiengesellschaft v. Argentine Republic* ICSID Case No. ARB/04/14, Award, 8 December 2008 [70]; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 [245].

¹¹ ICSID, 'Background Information on the International Centre for the Settlement of Investment Disputes' (ICSID) <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English>> accessed 15 July 2013 (Background).

¹² ICSID, (accessed 15 July 2013) (Report of Executive Directors) (n 2) 43. See Broches (n 10) 167; Zeiler (n 9) 80 – 81; U Grusic, 'The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes' (2009) 10 *Journal of World Investment and Trade* 69, 70.

¹³ Grusic (n 12) 71; S Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration' (2011) 10 *Washington University Global Studies Law Review* 419, 424.

parties.¹⁴ Although there is ‘dual consent’,¹⁵ in that both sets of jurisdictional requirements must be met, given that party consent is essential in order for arbitration to function, the ‘consent of the parties is the cornerstone of the jurisdiction of the Centre’.¹⁶ The manner in which both of these elements operate are considered in turn.

4.2.1 ICSID Convention

The ICSID Convention sets out the fundamental structure and purpose of ICSID as an administrative body for, amongst other things, the conduct of ICSID arbitration.¹⁷ It also sets out the powers and functions of an ICSID arbitral tribunal.¹⁸ States may utilise the services of ICSID, and the functions offered by ICSID arbitrations, when they consent to be bound by the ICSID Convention.¹⁹ When consenting to the ICSID Convention, states become bound by the jurisdictional limitations of ICSID, which are set out in Article 25 ICSID Convention in the following terms:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State... .

When determining the subject matter jurisdiction of ICSID, focus is placed on the phrase ‘any legal dispute arising out of an investment’, which curtails the jurisdiction of ICSID to a limited class of disputes.

¹⁴ Grusic (n 12) 71; Blanchard (n 13) 423 – 424. For discussion in arbitral practice, see for example, *Helnan International Hotels A/S v. Arab Republic of Egypt* ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010 [40]; *Malicorp Limited v. Arab Republic of Egypt* ICSID Case No. ARB/08/18, Award, 7 February 2011 [100] – [102].

¹⁵ Grusic (n 12) 71.

¹⁶ ICSID, (accessed 15 July 2013) (Report of Executive Directors) (n 2) 43. This has been reiterated in *Impregilo S.p.A. v. Islamic Republic of Pakistan* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [146]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* ICSID Case No. ARB/03/26, Award, 2 August 2006 [167].

¹⁷ ICSID, (accessed 15 July 2013) (Background) (n 11).

¹⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 171 Articles 41 - 47.

¹⁹ The use of ICSID is limited to member states. See ICSID, 'ICSID Dispute Settlement Facilities' <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities> accessed 15 July 2013.

First, ICSID's subject matter jurisdiction is restricted to 'legal' disputes. This excludes disputes that are political in nature²⁰ or 'conflicts of interest'.²¹ As a result, the dispute must concern the scope of a legal right or obligation, or a remedy in relation to a legal right or obligation.²²

The phrase 'arising directly out of an investment' requires that the dispute displays a sufficient nexus with the investment.²³ A dispute that arises directly out of an investment can be contrasted to disputes over rights and obligations of general application, for example, non-compliance with tax laws.²⁴ Notwithstanding, if general rights or obligations specifically impact an investment, this criterion is fulfilled.²⁵ Consequently, claims that are peripheral, or that indirectly relate to an investment, will be considered to fall outside of ICSID's jurisdiction.²⁶

The third restriction on ICSID jurisdiction is the existence of an investment. The term 'investment' remains undefined by ICSID, as what constitutes an investment is for the parties to determine, and comprises an element of party consent

²⁰ *Fedax N.V. and The Republic of Venezuela* ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 [15]; *Gas Natural SDG, S.A. v. Argentine Republic* ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 [20]. See OE Garcia-Bolivar, 'Foreign Investment Disputes under ICSID: A Review of its Decisions on Jurisdiction' (2004) 5 Journal of World Investment and Trade 187, 190; Y Kryvoi, *International Centre for Settlement of Investment Disputes* (Kluwer Law International 2010) 55.

²¹ ICSID, (accessed 15 July 2013) (Report of Executive Directors) (n 2) 44. See, for example *Lanco International, Inc. v. Argentine Republic* ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998 [47].

²² ICSID, (accessed 15 July 2013) (Report of Executive Directors) (n 2) 44. See *Fedax N.V. and The Republic of Venezuela* (n 20) [15]; *Tokios Tokelès v. Ukraine* ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 [106]; *AES Corporation v. Argentine Republic* ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 [43] – [44]; *M.C.I. Power Group, L.C. and New Turbine* ICSID Case No. ARB/03/6, Award, 31 July 2007 [63]; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic* (n 10) [255]; Broches (n 10) 168; Kryvoi (n 20) 55.

²³ This requirement does not refer to the direct nature of the investment but rather that the dispute stems directly from an investment. See *Fedax N.V. and The Republic of Venezuela* (n 20) [25] – [29]; *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic* ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 [71] – [74]; *Siemens A.G. v. Argentine Republic* ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 [150]; Garcia-Bolivar (n 20) 190; Kryvoi (n 20) 56. This is in contrast to general commercial disputes which fall outside of ICSID's jurisdiction. See e.g. *Fedax N.V. and The Republic of Venezuela* (n 20) [28].

²⁴ See *Amco Asia Corporation and others v. Republic of Indonesia* ICSID Case No. ARB/81/1, Second Arbitral Award, 31 May 1990 available at 1 ICSID Reports 463.

²⁵ Kryvoi (n 20) 56. See, for example *CMS Gas Transmission Company v. Republic of Argentina* ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 [27], [68]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006 [31]; *Total S.A. v. The Argentine Republic* ICSID Case No. ARB/04/01, Decision of the Tribunal on Objections to Jurisdiction, 25 August 2006 [62].

²⁶ Garcia-Bolivar (n 20) 190; Grusic (n 12) 82.

to arbitration.²⁷ The consequences of leaving the definition of investment to the parties are considered below.

When a dispute meets these three criteria, ICSID has subject matter jurisdiction over the dispute. However, it might not have jurisdiction over all disputes of this nature, as party consent is still required.

4.2.2 Party Consent

State consent under the ICSID Convention is necessary to establish the jurisdiction of ICSID, but does not generate any legal relationship between the foreign investor and the host state. The establishment of this connection is dependent on the terms of the consent directly agreed between the disputing parties.²⁸

Consent to ICSID arbitration between the disputing parties may arise in a variety of manners. The most common form of consent is by way of IIA,²⁹ in which the host state makes a standing offer³⁰ to all foreign investors covered by the IIA, to resolve disputes by way of ICSID arbitration.³¹ Should a foreign investor wish to accept this standing offer, they can register a claim against the host state at ICSID.³² The means by which consent is generated will not impact the jurisdiction of an

²⁷ ICSID, (accessed 15 July 2013) (Report of Executive Directors) (n 2) 44. See Broches (n 10) 168; Grusic (n 20) 82; Kryvoi (n 20) 57.

²⁸ C Reiner and C Schreuer, 'Human Rights and International Investment Arbitration' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 83; U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10 *Journal of World Investment and Trade* 653, 660.

²⁹ C Schreuer, 'The Future of Investment Arbitration' in MJ Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 790; C Schreuer, 'Consent to Arbitration' <http://www.univie.ac.at/intlaw/con_arbitr_89.pdf> accessed 15 July 2013 6.

³⁰ Schreuer, (accessed 15 July 2013) (n 29) 7; J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351, 360; PM Blyschak, 'State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases' (2009) 9 *Asper Review of International Business and Trade Law* 99, 133; G Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1 *Journal of International Dispute Settlement* 97, 112; Y Kryvoi, 'Counterclaims in Investor-State Arbitration' (2012) 21 *Minnesota Journal of International Law* 216, 226.

³¹ Schreuer, (accessed 15 July 2013) (n 29) 7; *Agua del Tunari, S.A., v. Republic of Bolivia* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 [76].

³² Schreuer, 'The Future of Investment Arbitration' (n 29) 790 – 791; Schreuer, (accessed 15 July 2013) (n 29) 8; *Generation Ukraine Inc. v. Ukraine* ICSID Case No. ARB/00/9, Award, 16 September 2003 [12.2] and [12.3]; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 [58].

ICSID tribunal,³³ however, the terms of the consent given will be definitive in relation to whether an ICSID tribunal has subject matter jurisdiction over a particular dispute. This is because party consent delimits what elements of the dispute an ICSID arbitral tribunal can hear.³⁴

The parties to the dispute cannot extend ICSID's jurisdiction under the ICSID Convention (even by agreement).³⁵ Yet, the consent of the disputing parties may further restrict subject matter jurisdiction within the existing limits of the ICSID Convention.³⁶ Thus, the scope of the parties' consent must either align with ICSID's jurisdiction or take a narrower stance.

The first opportunity for the parties to further limit ICSID's jurisdiction is through the definition of an investment. Enabling the parties to define what constitutes an investment permits the exclusion of certain types of disputes from ICSID arbitration in advance,³⁷ thereby limiting the jurisdiction of the ICSID arbitral tribunal.

In addition to defining what amounts to an investment, the parties determine the nature of investment disputes that they consent to bring before ICSID arbitration. States usually take one of four approaches when making an offer to arbitrate through the auspices of ICSID. The most common approach in IIAs is to for a state to agree to permit 'all' or 'any' investment disputes to ICSID arbitration.³⁸ The second approach is more limited, and restricts claims to three sources, being the investment authorisation, the investment agreement or the IIA.³⁹ The third approach limits subject matter jurisdiction to IIAs alone,⁴⁰ whilst the final type of host state offer to arbitrate limits subject matter jurisdiction to disputes over the quantum of

³³ See *Consortium R.F.C.C. v. Kingdom of Morocco* ICSID Case No. ARB/00/6, Award on Jurisdiction, 16 July 2001 [31]; *Aguas del Tunari, S.A., v. Republic of Bolivia* (n 31) [75] – [76].

³⁴ *PSEG Global Inc., the North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004 [139].

³⁵ *Joy Mining Machinery Limited v. Arab Republic of Egypt* ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 [50]; *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia* ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 [55]; *TSA Spectrum de Argentina S.A. v. Argentine Republic* ICSID Case No. ARB/05/5, Award, 19 December 2008 [134]; *Phoenix Action, Ltd. v. Czech Republic* ICSID Case No. ARB/06/5, Award, 15 April 2009 [74].

³⁶ Douglas (n 4) 234 – 235.

³⁷ Kryvoi, *International Centre for Settlement of Investment Disputes* (n 20) 57.

³⁸ Douglas (n 4) 234.

³⁹ Ibid 234 – 235.

⁴⁰ Ibid 235.

compensation following an expropriation.⁴¹ Consequently, party consent can further restrict the limited jurisdiction of ICSID set out in Article 25 ICSID Convention.

4.2.3 Preliminary Conclusion

The subject matter jurisdiction of ICSID arbitration is limited in scope by Article 25 ICSID Convention. This determines whether ICSID is able to conduct the arbitral proceedings. It may be further limited by the parties, both by their definition of investment, and the scope of their consent to ICSID arbitration. Thus, should the parties take a restrictive approach when defining investment, or regarding what disputes they agree to arbitrate, the jurisdiction of an ICSID arbitral tribunal will be limited accordingly.

4.3 ‘IN ACCORDANCE WITH HOST STATE LAW’ CLAUSES

A host state can try to exploit the limited scope of the ICSID arbitral tribunal’s jurisdiction using a foreign investor’s breach of international human rights law to exclude the foreign investor’s claims. The first means by which this might be achieved is through the operation of ‘in accordance with host state law’ clauses.

To function as effectively as possible, ideally a host state human rights defence will need to be established independently of express provisions in IIAs but still be based on ICSID arbitral practice.⁴² ‘In accordance with host state law’ clauses merge these requirements. They are provisions contained in IIAs, but do not set out an explicit host state human rights defence in the IIA. Their effect is to expressly exclude investments that do not comply with the domestic law of the host state from the protection of the IIA on the basis of consent to arbitration, thereby denying the jurisdiction of an ICSID arbitral tribunal.⁴³ In effect, by denying the jurisdiction of an ICSID arbitral tribunal, ‘in accordance with host state law’ clauses have the potential to operate as a procedural host state human rights defence.

To date, ‘in accordance with host state law’ clauses have primarily been applied to investments that are illegal in nature, or have been brought about through

⁴¹ Ibid.

⁴² See Part A, section 3.5.

⁴³ Moloo and Khachaturian (n 9) 1488; SW Schill, 'Illegal Investments in International Arbitration' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979734 accessed 25 March 2012 5, 7.

illegal conduct, such as bribery and corruption.⁴⁴ However, in principle, there is no reason to limit their application to this context, and they can equally apply to investments that involve violations of international human rights law that simultaneously breach host state law. Should this route be possible, this could provide an acceptable approach by which a host state can exclude ICSID jurisdiction over the foreign investor's claims on the basis of their violations of international human rights law.

'In accordance with host state law' clauses are express provisions requiring investments to be in conformity with the domestic law of the host state.⁴⁵ The clause can be found in an IIA in either the definition of an investment,⁴⁶ or as a stand-alone provision. An example of the definitional form of an 'in accordance with host state law' clause is Article I(2) of the Argentina – United States BIT which defines investment as follows:

The term 'investment' shall mean every kind of asset, including property and rights of any kind acquired or effected *in accordance with the laws of the receiving State*, including, although not exclusively: ...⁴⁷

Stand-alone clauses addressing the legality of investments often relate to the admission of investments⁴⁸ and are usually combined with a limitation on the application of the IIA to existing investments that conform with host state law.⁴⁹ Therefore, a stand alone clause may relate to issues of jurisdiction such as Article 9 of the 2005 German Model BIT which states:

This Treaty shall also apply to investments made prior to its entry into force by investors of either Contracting State in the territory of the other Contracting State consistent with the latter's legislation.

⁴⁴ See for example *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ICSID Case No. ARB/03/25, Award, 16 August 2007; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 6).

⁴⁵ *Desert Line Projects LLC v. Republic of Yemen* ICSID Case No. ARB/05/17, Award, 6 February 2008 [104] - [105].

⁴⁶ A Carlevaris, 'The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals' (2008) 9 *Journal of World Investment and Trade* 35, 36.

⁴⁷ Emphasis added. See also Article 1(1) of the Italy- Morocco BIT, which provides 'The term 'investment' designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, in accordance with the laws and regulations of the aforementioned party.'

⁴⁸ Carlevaris (n 46) 37; Schill (n 43) 2.

⁴⁹ Schill (n 43) 2.

Despite differences in wording and location within the IIA, both forms of ‘in accordance with host state law’ clauses have been interpreted uniformly by arbitral tribunals.⁵⁰ Consequently, should either form of an ‘in accordance with host state law’ clause be present in an IIA, it could be used as the basis for a host state human rights defence.

To function as an effective procedural host state human rights defence, ‘in accordance with host state law’ clauses must preclude the claims made by a foreign investor. ‘In accordance with host state law’ clauses accomplish this by defining the scope of investments, or restricting the application of the IIA, to investments in compliance with host state law. Hence, these clauses deprive investments that do not fall within these terms from the protection of the IIA.⁵¹ In doing so, they also act as limitations on the terms of the host state’s consent to ICSID arbitration.⁵² By restricting the host state’s consent, the jurisdiction of an ICSID tribunal is limited to those situations in which an investment is in compliance with the host state’s domestic law.⁵³ Given the fundamental role of consent in ICSID arbitration, this aspect of ‘in accordance with host state law’ clauses complies with the requirement that a host state human rights defence be based on ICSID arbitral practice. It is important to note that ‘in accordance with host state law’ clauses only affect the terms of the party consent and do not influence an ICSID tribunal’s jurisdiction by reference to Article 25 ICSID Convention.⁵⁴ As a result, in the absence of an ‘in accordance with host state law’ clause, any issues of illegality are more likely to be

⁵⁰ Carlevaris (n 46) 37; Schill, (n 43) 3 – 4, 5.

⁵¹ AJ Menaker, ‘The Determinative Impact of Fraud and Corruption on Investment Arbitrations’ (2010) 25 ICSID Review - Foreign Investment Law Journal 67, 69; Schill (n 43) 2. See *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia* (n 6) [266].

⁵² Schill (n 43) 6. See for example *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16) [246]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [340]; *Ioannis Kardassopoulos v. Georgia* ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 [182]; *Desert Line Projects LLC v. Republic of Yemen* (n 45) [104]; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia* (n 6) [258].

⁵³ Moloo and Khachaturian (n 9) 1488; Schill (n 43) 5, 7. For comparison, the dissent of Cremades in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades, 16 August 2007 did not view the definition of investment as a matter of jurisdiction based on the specific terms of the definition [10.2] – [14].

⁵⁴ Carlevaris (n 46) 39; Schill (n 43) 6; *Saba Fakes v. Republic of Turkey* ICSID Case No. ARB/07/20, Award, 14 July 2010 [108].

considered as issues of admissibility or on the merits, as either a defence, or as contributing to the investor's own loss.⁵⁵

In the absence of an 'in accordance with host state law' clause, the host state human rights defence would not be available to initially deny the jurisdiction of an ICSID arbitral tribunal. As not every IIA will contain an 'in accordance with host state law' clause, this may limit the widespread use of a host state human rights defence, unless these clauses are universally adopted in all future IIAs so as to enable a host state human rights defence to become operative when these IIAs enter into force.

Should a host state human rights defence be based on 'in accordance with host state law' clauses, its application would require consideration of both international and domestic law. By requiring a determination of the validity of the investment with the host state's domestic law, an 'in accordance with host state law' clause, despite being an international obligation, is reliant on principles of domestic law to function.⁵⁶ In effect, the obligation in international law is measured by reference to the domestic law standards of the host state. This is in contrast to the usual approach taken to the term 'investment', which requires that its meaning is established by reference to international law alone.⁵⁷ The *Salini* tribunal explained that the use of the term 'investment' in the context of an 'in accordance with host state law' clause:

[R]efers to the validity of the investment and not its definition. More specifically, it seeks to prevent the Bilateral Investment Treaty from protecting investment that should not be protected, particularly because they would be illegal.⁵⁸

⁵⁵ GA Alvarez and S Montt, 'Investments, Fair and Equitable Treatment, and the Principle of "Respect for the Integrity of the Law of the Host State": Toward a Jurisprudence of "Modesty" in Investment Treaty Arbitration' in MJ Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011) 589 – 590; Schill (n 43) 7.

⁵⁶ See *Alasdair Ross Anderson et al v. Republic of Costa Rica* ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 [57].

⁵⁷ See, for example *Saipem S.p.A. v. People's Republic of Bangladesh* ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 [82]. See also *Republic of Italy v. Republic of Cuba* Preliminary Award, 15 March 2005 [80].

⁵⁸ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 [46].

This approach has been adopted by subsequent tribunals faced with requirements of legality within the definition of investment.⁵⁹ The use of domestic law to determine the legality of the investment is justified on the basis of *renvoi*. Judge Morelli, in his separate opinion in *Barcelona Traction*,⁶⁰ explained the relationship between international and domestic law in the following terms:

In reality, no subordination of international responsibility, as such, to the provisions of municipal law is involved; the point is rather that the very existence of the international obligation depends on a state of affairs created in municipal law, though this is not so by virtue of municipal law but, on the contrary, by virtue of the international rule itself, which to that end refers to the law of the State.⁶¹

This stance has been adopted in ICSID arbitrations.⁶² As such, an ‘in accordance with host state law’ clause can only be invoked in ICSID arbitration if the foreign investor’s conduct breaches the host state’s municipal law. Therefore, an ‘in accordance with host state law’ clause can only give rise to a host state human rights defence if the host state has incorporated the terms of international human rights law into its domestic legal regime.

International human rights law obligations sourced from customary international law are likely to bind states without the need for their transformation into domestic laws.⁶³ Nonetheless, the likelihood of domestic laws supporting international human rights law obligations from non-customary sources may depend

⁵⁹ Schill (n 43) 3. See for example *Tokios Tokelès v. Ukraine* [84]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 [109]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16) [187]; *Railroad Development Corporation v. Republic of Guatemala* ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 [140].

⁶⁰ *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3.

⁶¹ *Ibid* Separate Opinion of Judge Morelli 234.

⁶² See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [394] ‘The BIT is, to be sure, an international instrument, but its Articles 1 and 2 and Article 2 of the Protocol, effect a *renvoi* to national law; a mechanism which is hardly unusual in treaties and, indeed, occurs in the Washington Convention. A failure to comply with the national law to which the refers will have an international legal effect.’ In contrast to this stance, the tribunal in *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16), after initially considering the application of domestic law, reverted back to international law as the appropriate standard on the basis that the applicable BIT formed part of the domestic law and therefore an international law standard should apply. The tribunal stated at [220] ‘the BIT, as valid law in El Salvador, is the primary and special legislation this Tribunal must analyse to determine whether Inceysa’s investment was made in accordance with the legal system of that Nation.’ The reference in the BIT to ‘generally recognized rules and principles of International Law’ meant that the tribunal could refer to principles of public policy, which it based its decision on. However, this approach is not strictly necessary in light of the terms of the ‘in accordance with host state law’ clause.

⁶³ MN Shaw, *International Law* (6th edn, Cambridge University Press 2008) 166; J Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 67.

on a variety of factors, including the level of development of the host state,⁶⁴ its constitutional structure,⁶⁵ and whether the human right in question is sourced from the ICCPR or the ICESCR, and as such, needs to be implemented immediately or over a period of time.⁶⁶ If the host state has failed to adopt certain non-customary international human rights law obligations into its domestic law, they will not be able to invoke a host state human rights defence on the basis of these obligations. Further, each host state is likely to have adopted different variations of non-customary international human rights law obligations into its domestic law. Consequently, at least for non-customary international human rights law obligations, the implicit reliance on domestic law required by 'in accordance with host state law' clauses could act as limitation on the universality of a host state human rights defence. As the host state human rights defence is still capable of functioning, albeit not in a universal manner, this factor alone does not preclude 'in accordance with host state law' clauses from forming the foundation of a host state defence.

Not only does the international human rights law obligation need to be sourced in the domestic law of the host state, the foreign investor must also have acted contrary to its terms. A foreign investor's conduct may violate domestic law with differing degrees of seriousness. Not all breaches will be sufficient to give rise to the use of 'in accordance with host state law' clauses. Therefore, the operation of a host state human rights defence based on 'in accordance with host state law' clauses is contingent on the extent to which the municipal provisions have been breached.

The threshold to determine what forms of conduct might be classified as illegal for the purposes of an 'in accordance with host state law clause' is still being developed through jurisprudence. However, minor breaches of law are unlikely to amount to a determination of illegality sufficient enough to remove investments from the protection of IIAs.⁶⁷ In *Tokios Tokelés v Ukraine*,⁶⁸ the host state argued that minor defects in documentation establishing the investment precluded the tribunal

⁶⁴ Icelandic Human Rights Centre, 'Implementation' <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/theconceptsofhumanrightsanintroduction/implementation/>> accessed 21 July 2013.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ *Tokios Tokelés v. Ukraine* (n 59) [86]; *Desert Line Projects LLC v. Republic of Yemen* (n 45) [119].

⁶⁸ *Tokios Tokelés v. Ukraine* (n 59).

from exercising its jurisdiction over the investment dispute. It was not alleged by the host state that the investment activities were ‘illegal *per se*’,⁶⁹ and the host state registered and permitted the investments to operate for a period of eight years.⁷⁰ On this basis, the tribunal stated:

Even if we were able to confirm the Respondent’s allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor error would be inconsistent with the object and purpose of the Treaty.⁷¹

Thus, minor defects giving rise to technical illegalities are not likely to be sufficient to give rise to a breach of an ‘in accordance with host state law’ clause and prevent an ICSID tribunal from exercising its jurisdiction.⁷² As a result, minor violations of international human rights law by a foreign investor, for example, not providing a sufficient amount of paid leave for workers, are unlikely to result in subject matter jurisdiction being denied by an ICSID arbitral tribunal. To prevent host states arguing that minor defects should preclude ICSID jurisdiction, some tribunals have suggested that ‘in accordance with host state law’ clauses should be interpreted in a liberal way to minimise the impact of errors made by a foreign investor in good faith.⁷³

Conversely, a foreign investor’s deliberate avoidance of the host state’s legal requirements has led to ICSID arbitral tribunals to reach the conclusion that they do not have subject matter jurisdiction over the dispute. In *Inceysa v El Salvador*,⁷⁴ the foreign investor fraudulently misrepresented its financial position, the identity and experience of a strategic partner, provided false information regarding an individual with key responsibilities and failed to disclose a connection with another company

⁶⁹ Ibid [86].

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Carlevaris (n 46) 47; Menaker (n 51) 70; Moloo and Khachaturian (n 9) 1494 -1495; Schill (n 43) 9. See also *Tokios Tokelés v. Ukraine* (n 59) [97]; *Desert Line Projects LLC v. Republic of Yemen* (n 45) [116] – [117], [119]; *Alpha Projektholding GmbH v. Ukraine* ICSID Case No. ARB/07/16, Award, 8 November 2010 [297].

⁷³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [396]; *Desert Line Projects LLC v. Republic of Yemen* (n 45) [116]. In contrast see *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 6) [264] where a balanced interpretation is advocated.

⁷⁴ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16).

during a public tender process.⁷⁵ The ICSID arbitral tribunal considered whether it was possible to limit party consent to legal investments, and after deciding it was possible, interpreted the ‘in accordance with host state law’ clause to have this effect.⁷⁶ Unusually, rather than examining the municipal law of El Salvador to determine the legality (or otherwise) of the act, the tribunal reviewed the foreign investor’s conduct against principles recognised under international law such as the principles of good faith, public policy, unlawful enrichment and the principle *nemo auditur propriam turpitudinem allegans*.^{77,78} The tribunal found that because the investment had been procured in breach of these principles, it did not comply with the ‘in accordance with host state law’ clause in the El Salvador-Spain BIT.⁷⁹

Similarly, in *Fraport v Philippines*,⁸⁰ the investor had fraudulently bid for the investment by secretly structuring its investment so that it exceeded the maximum shareholding permitted by a foreign investor according to the host state’s law.⁸¹ This approach was adopted by the foreign investor despite warnings from local advisors that the arrangements were in breach of Philippines law.⁸² Following the commencement of the investment, irregularities were discovered in the bid documents by the Philippines government and, on the basis of the irregularities, the Philippines Supreme Court set aside the investment agreement for being null and void on the grounds of public policy.⁸³ The investment was expropriated and the Philippines paid compensation.⁸⁴ Meanwhile, the foreign investor had filed an ICSID claim.⁸⁵ Despite advocating for a cautious application of the ‘in accordance with host state law’ clause so as not to disfavour the foreign investor,⁸⁶ the tribunal held that:

[T]he violation could not be deemed inadvertent and irrelevant to the investment. It was central to the success of the project. The awareness that the arrangements were not in accordance with Philippine law was

⁷⁵ Ibid Chapter IV.

⁷⁶ Ibid [186] – [206]. See also *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 6) [258].

⁷⁷ This maxim translates as ‘nobody can be heard recording his own turpitude’.

⁷⁸ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16) [230] – [264].

⁷⁹ Ibid [264].

⁸⁰ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44).

⁸¹ Ibid [120], [130], [132], [135].

⁸² Ibid [119], [120] [309].

⁸³ Ibid [217].

⁸⁴ Ibid [273].

⁸⁵ Ibid [6].

⁸⁶ Ibid [396].

manifested by the decision to make the arrangements secretly, and to try and make them effective under foreign law.⁸⁷

Arbitrators found no evidence of state awareness (preventing an estoppel claim)⁸⁸ and concluded, by a majority, that the ICSID tribunal lacked jurisdiction.⁸⁹ The lack of both transparency by the investor and respect for host law were deemed to be fundamental to the investment regime.⁹⁰ The language of the BIT was unequivocal in this matter.⁹¹ This award has subsequently been annulled on the basis that the foreign investor was not given the opportunity to respond to evidence introduced after the conclusion of the hearing.⁹² In light of the reason for the annulment, and the rejection of claims that the award failed to state the reasons for its decision, it is suggested that the approach taken by this tribunal was correct.

Should ‘in accordance with host state law’ clauses be used as a basis for a host state human rights defence, the violations of domestic human rights provisions must be serious enough to justify denying ICSID jurisdiction. The assumption that a host state human rights defence will only operate in relation to grave or persistent human rights violations by a foreign investor aligns with current ICSID jurisprudence on this point. These instances are the most egregious cases of human rights violations. Therefore, not only it is politically more acceptable to host states to take a limited approach to the host state human rights defence,⁹³ ICSID tribunals are also more likely to support the application of the defence in this manner. This factor would support the use of an ‘in accordance with host state law’ clause as the basis of the host state human rights defence.

A host state human rights defence centres on the conduct of the foreign investor. Despite this, the host state could be implicated in the human rights violations. This is likely to influence the success of a host state human rights defence based on an ‘in accordance with host state law’ clause. This is because host state awareness of, or involvement in the illegality itself, will preclude it from being able

⁸⁷ Ibid [398].

⁸⁸ Ibid [346] – [347].

⁸⁹ Ibid [398] – [401], [404].

⁹⁰ Ibid [398].

⁹¹ Ibid.

⁹² *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010.

⁹³ See section 3.3.2 above on host state reluctance.

to rely on the ‘in accordance with host state law’ clause. In *Kardassopoulos v Georgia*,⁹⁴ it was held that given that the state owned enterprises had exceeded their powers, the ‘in accordance with host state law’ clause would not be applicable. It was explained that illegality:

Relates to the investor’s actions in making the investment. It does not allow a state to preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws. In other words, a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with domestic law.⁹⁵

Further, state knowledge and acceptance of illegality may give rise to an argument of estoppel.⁹⁶ In *Kardassopolous*, Georgia approved the investments, and in doing so gave assurance to the foreign investor that the investment was in compliance with domestic law.⁹⁷ The Tribunal held that legitimate expectations can arise from the statements and conduct of the host state.⁹⁸

This aspect of ‘in accordance with host state law’ clauses creates more challenges in the context of a host state human rights defence. Host states will be aware of human rights violations within their territory, as they need to act in response to violations in order to comply with their international human rights law obligations.⁹⁹ However, the assumption that a host state human rights defence would only apply in situations of grave or persistent human rights violations would align with this requirement. In instances of unexpected grave human rights violations, host states would not have awareness of any breaches until the violations have taken place. As a result, the host state is acting in accordance with its international human rights obligations and its own actions are not illegal (unless it chooses not to take action in response). If persistent breaches are involved, that have been consistently

⁹⁴ *Ioannis Kardassopoulos v. Georgia* (n 52).

⁹⁵ *Ibid* [182] (emphasis in the original).

⁹⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [346] – [347]; *Desert Line Projects LLC v. Republic of Yemen* (n 45) [125]; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 6) [257] – [258].

⁹⁷ *Ioannis Kardassopoulos v. Georgia* (n 52) [194].

⁹⁸ *Ibid* [192].

⁹⁹ This forms part of the host state’s general obligation to protect human rights. See UNHCR, ‘Report of the High Commissioner for Human Rights - Human rights, trade and investment’ (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9 [28] – [30]; see also, for example, UNESCO, ‘General Comment 15 The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’ (20 January 2003) E/C.12/2002/11 [23]; UNHRC, ‘General Comment 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) CCPR/C/21/Rev.1/Add.13 [8].

prosecuted by the host state, no argument as to acceptance, or the creation of legitimate expectations can be raised as the host state has indicated the unacceptable nature of the human rights violations. In contrast, actions by the host state indicating their acceptance of human rights violations may preclude them from raising a host state human rights defence. Therefore, the conduct of the host state becomes paramount when considering whether the defence remains available under an ‘in accordance with host state law’ clause, and host states will need to be aware of the degree to which they might have contributed to the violation of international human rights law. This approach accords with the characterisation of the host state human rights defence discussed in section 3.3.2, which requires that a host state take into account those affected by the human rights violation and consider the extent of their own contribution to the breach of international human rights law to avoid the risk of dual liability.

A further consideration for the development of a host state human rights defence is that the operation of ‘in accordance with host state law’ clauses has been limited to violations of domestic law that directly relate to the investment in question. This mirrors the subject matter jurisdiction set out in Article 25 of the ICSID Convention.¹⁰⁰ The tribunal in *Saba Fakes v Turkey* set out its justifications for this limitation:

The Tribunal also considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. However, unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory.¹⁰¹

Whilst it is a generally accepted principle that a state cannot rely on its domestic law to escape its international obligations,¹⁰² in the case of international human rights law, slightly different considerations apply. The invocation of domestic law forms

¹⁰⁰ See section 4.2.1 above.

¹⁰¹ *Saba Fakes v. Republic of Turkey* (n 54) [119].

¹⁰² J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) Article 3. See Shaw (n 63) 782.

part of a state's international obligations under international human rights law to ensure compliance with the human rights obligations in question,¹⁰³ including progressive rights such as those sourced from the ICESCR.¹⁰⁴ Failure to apply domestic provisions would violate international human rights law. Thus, the direct link between the international and the national obligation distinguishes human rights obligations from other domestic laws. Hence, the use of domestic law in this manner is not an issue of escaping liability. The issue becomes one of regime conflict between an international obligation that must be manifested as a municipal law (international human rights law) and international investment law. Whilst '[l]egal action will also be possible in competent domestic tribunals',¹⁰⁵ which may avoid this conflict in ICSID arbitration, this course of action is pre-emptive in cases of unexpected gross violations, and has been ineffective in cases of persistent breaches. Consequently, ICSID arbitration provides the most appropriate forum to consider these matters. On this basis, a similar approach to that used in *Saba Fakes* should not be employed in relation to a host state human rights defence, as the purpose of the host state human rights defence is to address this type regime conflict. Provided that a proximate link exists between the conduct of the foreign investor and the violation of international human rights law, this should be sufficient. This can be determined on a case-by-case basis by examining the factual and causal relationship between the acts of the foreign investor and the specific human rights violations.

The timing of the foreign investor's violation of human rights can also impact the operation of a host state human rights defence founded upon an 'in accordance with host state law' clause. Relevant breaches of domestic law for the purposes of 'in accordance with host state law' clauses have been limited to those that affect the admission of the investment, and not its continued operation once admitted.¹⁰⁶ As a result, the foreign investor's illegal conduct must have occurred prior to the commencement of the investment. This was not initially an express requirement. In *Salini v Morocco*, the tribunal stated that 'whether one looks to the pre-contractual stage or that corresponding to the performance of the contract for

¹⁰³ Office of the High Commissioner for Human Rights, 'International Human Rights Law' <<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>> accessed 16 July 2013.

¹⁰⁴ O De Schutter, *International Human Rights Law* (Cambridge University Press 2010) 461.

¹⁰⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* Cremades dissent (n 53) [39].

¹⁰⁶ Schill (n 43) 14.

services, it has never been shown that Italian companies infringed the laws and regulations of the Kingdom of Morocco'.¹⁰⁷ These terms would appear to permit on-going breaches of domestic law throughout the operation of the investment.

Although the *Salini v Morocco* tribunal did not close the door to illegality after the commencement of the investment, this option has subsequently been denied. In relation to the 'in accordance with host state law' clause in *Fraport v Philippines*, the tribunal limited the application to legality at the time the investment was initiated:

Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the *entry* of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the *initiation* of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of the violation of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.¹⁰⁸

This position was endorsed in *Hamester v Ghana* where the tribunal stated that, under the provision in question, 'the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue'.¹⁰⁹ A similar interpretation was given to the 'in accordance with host state law' clause in *Saba Fakes v Turkey*.¹¹⁰ Most recently in the *Teinver v Argentina* and *Quiborax v Bolivia* awards, the temporal limits of the terms of the 'in accordance with host state law' clauses were re-emphasised, limiting their application to pre-establishment illegality.¹¹¹

¹⁰⁷ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco* (n 58) [46].

¹⁰⁸ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [345].

¹⁰⁹ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* ICSID Case No. ARB/07/24, Award, 18 June 2010 [127].

¹¹⁰ *Saba Fakes v. Republic of Turkey* (n 54) [119].

¹¹¹ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (n 6) [317] – [318]; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (n 6) [266].

The assumptions employed for the purposes of this thesis limit the scope of the host state human rights defence to situations in which investments are already in existence. Therefore, the temporal limitations raised in these awards precludes the application of ‘in accordance with host state law’ clauses as a basis for a host state human rights defence. This requirement does not automatically prevent human rights violations from being deemed to be illegal conduct for the purposes of such a clause. However, the human rights violations will need to be associated with the introduction of the investment. Given the reduced role of the investor in the jurisdiction of the host state at this point of time, there are only limited situations in which this may be applicable. In light of this limitation, the use of ‘in accordance with host state law’ clauses is not an appropriate basis for a host state human rights defence in the terms being considered in this thesis.

4.3.1 Preliminary Conclusion

‘In accordance with host state law’ clauses provide a hybrid form of the key attributes sought in a host state human rights defence. Whilst being express provisions of an IIA, they rely on clearly established ICSID arbitral practice regarding the significance of party consent. Their effect is to deny the jurisdiction of an ICSID arbitral tribunal, thereby offering an avenue for the establishment of procedural host state human rights defence.

The application of ‘in accordance with host state law’ clauses demonstrate some potential for their translation into a host state human rights defence. Most host states will have domestic legal provisions that reflect the majority of international human rights law obligations. Variance in provisions between different jurisdictions could undermine the universality of the defence, but this does not prevent this procedural basis from being adopted. The use of ‘in accordance with host state law’ clauses is particularly suited to large scale human rights violations. These are envisaged as being the most appropriate violations for the invocation of a host state human rights defence. Further, host state involvement in the human rights violation may preclude the desirability of claiming the defence, which aligns with the political considerations that host states should consider when arguing the defence before an ICSID arbitral tribunal. Notwithstanding, the operation of ‘in accordance with host state law’ clauses does not fit easily with the requirement that general domestic law

cannot be invoked to deny jurisdiction. Whilst this limitation can be overcome, the need for the human rights violation to have occurred prior to the establishment of the investment undermines the desirability of ‘in accordance with host state law’ clauses as the basis of the host state human rights defence. The potential factual scenarios that a host state human rights defence is seeking to address encompasses post-establishment breaches of international human rights law. Although initially extending to include such conduct, ‘in accordance with host state law’ clauses have subsequently been precluded from operating in these instances. This factor significantly detracts from the suitability of ‘in accordance with host state law’ clauses forming the legal basis of a host state human rights defence.

Although this reasoning may seem unduly restrictive, the need for a solid foundation for the defence is paramount if a host state human rights defence is to be accepted as a legitimate defence in ICSID arbitration. Attempting to establish a host state human rights on a basis that has been expressly excluded by a series of ICSID arbitral tribunals would undermine the credibility of the host state human rights defence. Further, an approach that ignored established legal principles in favour of an idealised understanding of the law would be contrary to positivist theory. Both of these aspects are fundamental to the future success of a host state human rights defence. Consequently, ‘in accordance with host state law’ clauses will not be used as the foundation of the host state human rights defence in this thesis.

4.4 ADMISSIBILITY

A second procedural basis for a host state human rights is to rely on the same violations of international human rights law, but having established jurisdiction, to declare the foreign investor’s claim as inadmissible. Similarly to ‘in accordance with host state law’ clauses, the situations in which this outcome might be achieved are circumscribed. Nevertheless, the nature of admissibility may overcome the difficulties encountered with ‘in accordance with host state law’ clauses.

A human rights host state defence based on ‘in accordance with host state law’ clauses would directly impact the scope of the host state’s consent to arbitrate, and as a result delimit the jurisdiction of an ICSID tribunal. In contrast, should a host state human rights defence be founded on admissibility, it would focus not on whether an ICSID tribunal *can* hear the claim, but instead, whether it *should* hear the

claim.¹¹² This is because, whilst jurisdiction relates to the attributes of the tribunal and its powers, admissibility focuses on the attributes of the claim.¹¹³ Thus, a host state human rights defence based on admissibility would relate to the appropriateness of an ICSID tribunal hearing a claim after the jurisdiction of the ICSID tribunal has been established.¹¹⁴

Should a claim be deemed to be inadmissible, despite the existence of jurisdiction, the claim will be dismissed¹¹⁵ and it will not proceed to the merits stage.¹¹⁶ The distinction between jurisdiction and admissibility is often blurred, and occasionally misunderstood by tribunals,¹¹⁷ but there are implications that flow from whether a decision is based on jurisdiction or admissibility. Decisions based on jurisdictional grounds may be the subject of review, whereas decisions based on admissibility are final and non-reviewable.¹¹⁸ Therefore, by relying on admissibility as the basis of a host state human rights defence a host state could potentially dismiss a foreign investor's claim without any further review. This provides a possible formulation for a second form of procedural host state human rights defence.

To encourage ICSID tribunals to apply a host state human rights defence, it is desirable for it to be established by reference to accepted ICSID arbitral practice. Admissibility is not expressly catered for within ICSID arbitration.¹¹⁹ Neither the ICSID Convention nor the ICSID Arbitral Rules provide for the possibility for, or

¹¹² CA Miles, 'Corruption, Jurisdiction and Admissibility in International Investment Claims' (2012) 3 Journal of International Dispute Settlement 329, 335; *Ioan Micula, Viorel Micula and others v. Romania* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 [63]; *Marion Unglaube and Reinhard Unglaube v Costa Rica* ICSID Case No. ARB/08/1 and ARB/09/20 Award, 16 May 2012 [293].

¹¹³ See for example *HOCHTIEF Aktiengesellschaft v. Argentine Republic* ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 [90].

¹¹⁴ Paulsson (n 7) 604; A Newcombe, 'Investor Misconduct: Jurisdiction, admissibility or merits?' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 193.

¹¹⁵ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 [33].

¹¹⁶ Newcombe (n 114) 192.

¹¹⁷ Zeiler (n 9) 82; see *Vekoma BV v Maran Coal Corporation* Judgment, 17 August 1995 ASA Bulletin (1996), 673 in which a decision was appealed on the basis of jurisdiction when the decision related to admissibility.

¹¹⁸ Paulsson (n 7) 601, 603, 606, 617; Newcombe (n 114) 193; Miles (n 112) 338.

¹¹⁹ The ICSID Convention only refers to issues of 'jurisdiction' and 'competence' in Article 41 ICSID Arbitration Rules. Competence has been confused with admissibility by some tribunals including *The Rompetrol Group N.V. v. Romania* ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 [112] and *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay* ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [52]. See also *CMS Gas Transmission Company v. Republic of Argentina* (n 25) [41]; Zeiler (n 9); Paulsson (n 7) 608.

the consequences of, admissibility.¹²⁰ As a result, the legal basis for deeming claims to be inadmissible is found *solely* in ICSID arbitral practice. Given the lack of clear mandate for such an approach within the documents establishing ICSID arbitration, its acceptability as a suitable basis for the defence will depend on the criteria against which admissibility decisions are made. ICSID tribunals habitually consider the admissibility of claims by drawing from international public policy considerations.¹²¹ Hence, it is necessary to consider the framework in which this decision making process functions.

International (or transnational) public policy refers to public policy grounds that are applicable in all jurisdictions.¹²² In 1963, Judge Lagergren, rather controversially, made use of international public policy to deny jurisdiction as, in his view, the contract that formed the subject of the dispute involved corruption.¹²³ He deemed the contract in question to be ‘contrary to good morals and to an international public policy common to the community of nations.’¹²⁴ On this basis, he declined to exercise jurisdiction, as parties involved in ‘gross violations of good morals and international public policy’ forfeit their right to ask for assistance from courts and tribunals when seeking to settle disputes.¹²⁵ Although this decision remains controversial given Judge Lagergren’s decision to decline to hear the matter on the basis of jurisdiction rather than admissibility,¹²⁶ the general approach taken is reflected in current ICSID arbitral practice. At present, ICSID tribunals have considered admissibility in the context of illegal conduct, and more specifically, corruption.¹²⁷ However, the *Phoenix Action* tribunal recognised that international public policy considerations were not restricted to corruption or bribery:

To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments

¹²⁰ Zeiler (n 9) 89; Newcombe (n 114) 193 – 194; Miles (n 112) 334.

¹²¹ See ML Seelig, 'Notion of Transnational Public Policy and Its Impact on Jurisdiction Arbitrability and Admissibility' [2009] *The Annals of the Faculty of Law in Belgrade - Belgrade Law Review* 116; Miles (n 112) 350.

¹²² Menaker (n 51) 72.

¹²³ See JW Yackee, 'Investment Treaties and Investor Corruption: An Emergent Defense for Host States' (2012) 53 *Virginia Journal of International Law* 723, 726 – 727.

¹²⁴ See *ibid* 728.

¹²⁵ See *ibid*.

¹²⁶ See *ibid*.

¹²⁷ *Ibid*.

made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.¹²⁸

Therefore, there is no restriction that excludes admissibility decisions based on international public policy from being utilised as a host state human rights defence.

In addition to having no basis in ICSID documentation, a host state human rights defence based on admissibility and international public policy also functions independently from IIAs.¹²⁹ The justifications for the independent operation of international public policy vary, but are generally based on the need for foreign investors to evidence good faith and not take unfair advantage of host state offers of ICSID arbitration as a form of dispute resolution.¹³⁰ Hence, it could be argued that international public policy reflects moral aspects of how parties should act in international dispute resolution, and as such, is based on a naturalist conception of public international law. Thus, the key justification for the use of international public policy runs the risk of undermining the positivist theoretical framework selected for the host state human rights defence.

International public policy is intended to minimise the impact of ‘bad faith’ in public international law, and can be viewed as a means of asserting what conduct is acceptable based on naturalist thinking. Yet, the concept of good faith in public international law may also be found in law based on positivist sources. The notion of good faith is prevalent in the VCLT and its parallel customary international law obligations. For example, the idea of states acting in good faith has been accepted in the proposition of *pacta sunt servanda*, which requires good faith when complying with international obligations sourced from treaties.¹³¹ Further, Article 31(1) VCLT on treaty interpretation requires that interpretation be undertaken in good faith. Consequently, despite the moral undertones of good faith as found in international public policy, it has consensual origins in treaties designed to achieve a similar purpose. Given that the notion of good faith in both instances discussed above is to

¹²⁸ *Phoenix Action, Ltd. v. Czech Republic* (n 35) [78].

¹²⁹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16) [230] – [244]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [402]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (n 109) [123] [124]; *Phoenix Action, Ltd. v. Czech Republic* (n 35) [101]; *Plama Consortium Limited v. Republic of Bulgaria* ICSID Case No. ARB/03/24, Award, 27 August 2008 [138]; *Yackee* (n 123) 734 – 735.

¹³⁰ See *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16) [245] [249].

¹³¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 26.

avoid the abuse of public international law, and that states have consented to this principle in the VCLT, it is posited that good faith, as applied to international public policy, is also based on a positivist, consensual foundation. Therefore, the operation of international public policy could be used to establish a host state human rights defence.

Having established the potential application of admissibility to issues relating to international human rights law, the manner in which international public policy is applied will be determinative of its effectiveness as the basis of a host state human rights defence. There have been several instances where international public policy has been applied in relation to the admissibility of claims in ICSID arbitration. The tribunal in *Inceysa*, when considering an ‘in accordance with host state law’ clause, rather than evaluating the foreign investor’s conduct against the domestic law of El Salvador, made a determination of illegality based on four ‘general principles of law’ (good faith, *nemo auditor propriam turpitudinem allegans*, public policy and unlawful enrichment).¹³² In doing so, the tribunal cited a general principle of ‘good faith’ to be respected by investors when making investments,¹³³ and additionally referred to principles ‘based on justice’.¹³⁴ The tribunal in *Fraport*, also recognised the role of good faith,¹³⁵ and justified its finding on the basis of the foreign investor’s conduct being a conscious violation of the local laws.¹³⁶ As a result, investors are required to ‘conduct their relations with foreign investors in a transparent fashion’¹³⁷ including ‘respect for the integrity of the law of the host state’.¹³⁸ In *Plama*, the tribunal relied on *Inceysa* with respect to the good faith element, which ‘encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment.’¹³⁹ This position was justified by reference to the role of the Energy Charter Treaty, the applicable IIA in this instance, which was intended to ‘strengthen the rule of law on

¹³² Carlevaris (n 46) 40.

¹³³ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (n 16) [230] – [244].

¹³⁴ *Ibid* [242], [340].

¹³⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (Cremades dissent) (n 53) considered that the principle of good faith applied to both the foreign investor and to the Host State. This prevented potential abuse of domestic law by the Host State [28.1] [29.1].

¹³⁶ Carlevaris (n 46) 43.

¹³⁷ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [402].

¹³⁸ *Ibid*.

¹³⁹ *Plama Consortium Limited v. Republic of Bulgaria* (n 129) [144].

energy issues'.¹⁴⁰ In *Phoenix Action*, the tribunal additionally classified international public policy as a means of protecting the purpose of ICSID arbitration.¹⁴¹ The tribunal stressed that the investment needed to be made in good faith, and understood as a principle of public international law:

[T]o prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.¹⁴²

While it is clear that the abuse of ICSID arbitration will not be tolerated based on principles of international public policy, the precise scope of these principles remains unclear. Each ICSID arbitral tribunal discussed above took a differing interpretation of what international public policy required. Consequently, a host state human rights defence relying on admissibility for its validity is subject to the imprecise nature of good faith in international public policy. This could undermine the ability of admissibility to provide a clear foundation for a host state human rights defence. As considered in Chapter 3, a host state human rights defence needs to utilise established ICSID arbitral practice to overcome difficulties with its rejection by those arbitrators that seek to minimise wider policy considerations. It is not clear whether arbitrators who adopt a 'private' approach to ICSID arbitration would readily endorse and apply a host state human rights defence established on such imprecise, policy driven grounds. In addition to the lack of clarity regarding the content of the standard, there is no clear basis in ICSID for pursuing such an approach. By linking international human rights law to international public policy in this manner, the challenges associated with its acceptance are likely to be compounded. Until a consistent body of well accepted practice develops, the use of international public policy as a basis for a host state human rights defence appears to be questionable, which could undermine the general acceptability and credibility of a host state human rights defence.

A further restriction on the use of admissibility as the basis of a host state human rights defence might be the timing of the illegality. Similarly to 'in

¹⁴⁰ Ibid [138] – [140].

¹⁴¹ *Phoenix Action, Ltd. v. Czech Republic* (n 35) [113]. See also *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana* (n 109) [123] [124].

¹⁴² *Phoenix Action, Ltd. v. Czech Republic* (n 35) [113].

accordance with host state law' clauses, it appears to be limited to the time that the investment is created. For example, the tribunals in *Fraport* and *Hamester*, both confirmed that any post-establishment breach of host state law was a matter for the merits of the dispute.¹⁴³ However, these statements were made in the context of 'in accordance with host state law' clauses whose terminology was limited to illegality during the initiations of investments. Thus, it is not clear whether international public policy can be used as a basis to declare a claim as inadmissible in cases of post-establishment illegality. The decision of *World Duty Free*, whose jurisdiction was based on an investment agreement rather than IIA, indicates that international public policy may be constrained by the same limits as 'in accordance with host state law' clauses. When considering the payment of a bribe by the foreign investor to secure the investment, the tribunal stated that 'Mr. Ali retained a free choice whether or not to invest in Kenya and whether or not to conclude the Agreement.'¹⁴⁴ It has been suggested that 'the latter statement suggests that one can draw a distinction between initial illegal conduct to obtain an investment and conduct engaged in subsequently to maintain an initially legal investment'¹⁴⁵ given its focus on Mr Ali's pre-investment conduct.¹⁴⁶ If it cannot be clearly established that a host state human rights defence can apply in instances of post-establishment human rights violations, its scope of application will not be sufficiently wide for the purposes of this thesis.

4.4.1 Preliminary Conclusion

Admissibility, based on considerations of international public policy provides a framework on which a second form of procedural host state human rights defence could be established. Admissibility has the potential to apply to a foreign investor's conduct that breaches international human rights law. This stance could be justified by reference to the foreign investor's bad faith in commencing ICSID arbitration given their violation of international human rights law. Further, international public policy conforms to positivist theories. Irrespective, its terms are imprecise, in part

¹⁴³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (n 44) [345]; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (n 109) [128]. See Moloo and Khachaturian (n 9) 1486 – 1487; Yackee (n 123) 741.

¹⁴⁴ *World Duty Free Co. Ltd v Republic of Kenya* ICSID Case No ARB/00/7, Award, 4 October 2006 [178].

¹⁴⁵ Schill (n 43) 27.

¹⁴⁶ A similar distinction was drawn in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (n 6) [330] – [331].

due to the lack of any clear basis in the documents that establish ICSID arbitration. As a host state human rights defence will need a strong foundation for it to be accepted and applied by ICSID arbitral tribunals, including those that adopt a ‘private’ approach, basing the defence on admissibility contains an element of risk. When combined with the temporal aspect of when illegality must take place, this risk is enhanced. Therefore, this thesis does not seek to rely on admissibility as the framework for a host state human rights defence.

Rejecting a host state human rights defence on both procedural grounds may appear to be excessively cautious. Notwithstanding, given that a host state human rights defence is a novel addition to ICSID arbitration, and in light of the dominant ‘private’ approach to ITA, a solid legal basis for the defence is necessary. It is further submitted that restraint should be exercised when denying a foreign investor a hearing on the merits, as the general desirability of taking this stance remains contested for a variety of policy reasons.

4.5 POLICY CONCERNS REGARDING DENIAL OF JURISDICTION

Both forms of procedural host state human rights defence raised in this chapter can be addressed prior to a full hearing on the merits of the foreign investor’s claim.¹⁴⁷ This provides a strategic advantage for the host state as their conduct will not be examined until these issues have been determined.¹⁴⁸ However, it also has the potential to damage the credibility of the host state human rights defence and to undermine the legitimacy of ICSID arbitration more generally. In some cases, admissibility decisions may be considered together with arguments relating to the merits of the claim. However, admissibility remains a separate legal consideration to the merits¹⁴⁹ and has the effect of denying the ICSID arbitral tribunal’s jurisdiction without any form of review. Given these implications, this section considers some of the policy considerations that underlie the use of a procedural host state human rights defence. It is posited that these policy considerations further militate against the use

¹⁴⁷ The effect of ‘in accordance with host state law’ clauses must be considered at the jurisdictional stage of ICSID proceedings (as they limit host state consent). The admissibility of the claim may be considered prior to the merits stage to determine if the ICSID arbitral tribunal should consider the merits of the claim.

¹⁴⁸ Miles (n 112) 338, 352.

¹⁴⁹ Ibid 334.

of ‘in accordance with host state law’ clauses and admissibility as the foundation of a host state human rights defence.

The first policy concern relates to the nature of ICSID arbitral decisions on jurisdiction. Decisions over jurisdiction tend to be ‘binary’, in that either jurisdiction is established or denied.¹⁵⁰ There is little scope for an ICSID arbitral award to generate a nuanced outcome. As a result, the jurisdictional stage of ICSID arbitral proceedings is not well suited to considering complex matters, like allegations of violations of international human rights law, which may need further investigation by the tribunal to determine their full impact on the proceedings.¹⁵¹ This may give rise to claims that a host state human rights defence based on ICSID jurisdiction does not exhibit procedural fairness.

Further, relying on illegality under an ‘in accordance with host state law’ clause at the jurisdictional stage of ICSID arbitration leads to an inequitable allocation of rights between the parties. As illegality features in the terms of host state consent, issues regarding the legality of the foreign investor’s conduct are matters of jurisdiction. In contrast, questions regarding host state illegal conduct remain to be determined on the merits,¹⁵² given that any illegality by the host state does not affect the terms of either party’s consent. Consequently, denying a foreign investor’s claim on a jurisdictional basis for reasons of illegality may have a ‘draconian’ impact.¹⁵³ Complex claims of illegality cannot be fully addressed at the jurisdictional stage of ICSID arbitration. If arbitrary decisions were to be consistently made when a host state human rights defence was argued on a procedural basis, ICSID arbitral tribunals are likely to be criticised and will potentially be reluctant to fully consider procedural human rights defences in the future. Therefore, the limitations of jurisdictional decisions could quickly undermine the continued operation of the defence.

¹⁵⁰ Newcombe (n 114) 199.

¹⁵¹ Alvarez and Montt (n 55) 589; Moloo and Khachaturian (n 9) 1500.

¹⁵² *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* Cremades dissent (n 53) [37.1].

¹⁵³ Alvarez and Montt (n 55) 589; see Newcombe (n 114) 199 who suggests that an award may be able to be challenged under the New York Convention.

Policy concerns are also present in decisions relating to admissibility. Given that there are no procedural routes for challenging a decision on admissibility,¹⁵⁴ decisions with regard to violations of international human rights law heard at either a preliminary or merits stage of the ICSID proceedings should not be undertaken lightly. A means of managing the consequences of a decision on admissibility at a preliminary or jurisdictional stage of the hearing is to limit decisions on this ground to to 'manifest' or 'egregious' cases.¹⁵⁵ The tribunal in the *Phoenix Action* award adopted this approach. The Tribunal stated:

[T]here is no doubt that the requirement of conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.¹⁵⁶

Whilst this approach is a possibility, determining the admissibility of a claim at a preliminary stage requires a tribunal to analyse the merits of the claim (albeit superficially).¹⁵⁷ Given the repercussions of an incorrect decision on admissibility, it may be advisable to reserve this consideration until the merits phase of the arbitration, when full attention can be paid to the substantive arguments presented by the parties. This is especially so given the vague content of international public policy.¹⁵⁸ Again, should errors be made by ICSID arbitral tribunals, this would undermine the credibility of the host state human rights defence in the longer term.

Some commentators support the use of admissibility to consider illegality founded on violations of international human rights law.¹⁵⁹ They justify this position on the grounds that, should human rights violations directly relate to an investment, the very existence of the investment means that ICSID jurisdiction is already

¹⁵⁴ Newcombe (n 114) 199.

¹⁵⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* Cremades dissent (n 53) where it was suggested that gross illegality may bar a claim [40.2]; Alvarez and Montt (n 55) 589.

¹⁵⁶ *Phoenix Action, Ltd. v. Czech Republic* (n 35) [104]. The approach of this tribunal confuses the purpose of jurisdiction with admissibility. It is only in cases of 'in accordance with host state law' clauses that denial of jurisdiction is a possibility. Therefore, manifest illegality can only affect the admissibility of the claim. This interpretation is supported by the reference to judicial economy, which would suggest that the merits of the claim were involved, rather than issues of jurisdiction (Schill (n 43) 24 – 25).

¹⁵⁷ Alvarez and Montt (n 55) 590.

¹⁵⁸ Newcombe (n 114) 199.

¹⁵⁹ P Dumberry and G Dumas-Aubin, 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration' (2012) 13 *Journal of World Investment and Trade* 349, 365.

established.¹⁶⁰ In light of the illegal conduct of the investor, and utilising the doctrine of ‘clean hands’, they see no reason to distinguish between fraudulent or corrupt behaviour and that of human rights violations.¹⁶¹ As discussed above, in principle, there is no reason to distinguish these concepts, and tribunals have not drawn this distinction based on considerations of international public policy.¹⁶² Still, even if this approach was taken at the merits stage of the ICSID proceedings, given the significance of a decision on admissibility due to its lack of review procedure, this is a large risk to take. Incorrect decisions would damage the long-term viability of the defence. This author is not willing to risk the future operation of the host state human rights defence on this basis.

The second policy consideration relates to the timing of the foreign investor’s illegal conduct. ICSID tribunals have consistently limited the operation of jurisdiction and admissibility decisions to illegality that affects the initiation of the investment and not its subsequent operation. In relation to ‘in accordance with host state law’ clauses, this is partially based on the language of the specific IIA provisions that limit party consent. However, other justifications for distinguishing timing in this manner have been mooted. First, when illegal conduct by a foreign investor affects the establishment of the investment, it affects the consent of the parties to submit their dispute to ICSID arbitration.¹⁶³ As party consent is ‘the cornerstone’ of ICSID arbitration, the illegal nature of the investment undermines the basis on which the whole process of dispute resolution is to proceed. Second, illegality at the stage when an investment is being established taints the entire investment and its subsequent operation.¹⁶⁴ Given that all aspects of the investment are affected by the illegality, the investment can be considered to fall outside of the jurisdiction of the ICSID tribunal, or it can be deemed to be inadmissible. This can be contrasted to instances where subsequent illegal conduct can be attributed to the investor.¹⁶⁵ In cases of post-establishment human rights violations, the illegal conduct may not impact every aspect of the investment. Consequently, certain claims would not be affected by illegal conduct, resulting in the ICSID tribunal having

¹⁶⁰ Ibid 361 – 362.

¹⁶¹ Ibid 362 – 365.

¹⁶² See *Phoenix Action, Ltd. v. Czech Republic* (n 35).

¹⁶³ Schill (n 43) 28, 29.

¹⁶⁴ Moloo and Khachaturian (n 9) 1500.

¹⁶⁵ Ibid 1500 – 1501.

jurisdiction over particular elements of the claim. A determination as to which aspects of the claim are to be denied jurisdiction requires a detailed consideration of the dispute, which is more appropriate at the merits stage of the arbitration. For these reasons, it is argued that subsequent illegal conduct by an investor should only be addressed as a merits based argument within ICSID arbitration.

Therefore, considering any violations of international human rights law at the merits stage of ICSID arbitration has the benefit of not requiring tribunals to distinguish between whether illegality affected the initiation or subsequent operation of an investment, or determining the severity of the illegal conduct against standards of ‘manifest’ or ‘egregious’.¹⁶⁶ It permits a tribunal to undertake a full and detailed consideration of all of the relevant factors at play,¹⁶⁷ including evaluating ‘the proof and consequences of illegality.’¹⁶⁸ This position is also supported by the, albeit limited, but still present, potential avenues for an investor to challenge a decision made at the merits stage of proceedings.¹⁶⁹ In summary, the consideration of the effect of international human rights law violations at either the jurisdictional stage, or based on admissibility does not provide the strong legal foundation for a host state human rights defence, identified as being desirable in Chapter 3.

4.6 CONCLUSION

Host states may seek to deny an ICSID arbitral tribunal’s jurisdiction on the basis of international human rights violations law committed by the foreign investor. Such an approach is available in limited circumstances by virtue of both ‘in accordance with host state law’ clauses and through the application of international public policy. However, ‘in accordance with host state law’ clauses and, to date, international public policy, are temporally limited to pre-establishment illegality. Further, the lack of express legal basis for admissibility in the instruments guiding ICSID arbitration would leave a host state human rights defence subject to criticism. Although these conclusions illustrate a conservative approach, this is preferable to ensure the potential long-term viability of the defence. Therefore, it is submitted that neither procedural basis provides a solid basis for a host state human rights defence in

¹⁶⁶ Alvarez and Montt (n 55) 591.

¹⁶⁷ Ibid 590.

¹⁶⁸ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* Cremades Dissent (n 53) [39].

¹⁶⁹ As set out in ICSID Convention, Article 52.

instances of post-establishment human rights violations. Further, policy considerations militate against a complete denial of jurisdiction in disputes that have the potential to be finely balanced and require an ICSID arbitral tribunal to review complex facts and legal arguments. Hence, the approach that will form the framework of this study is that a host state human rights defence should be substantive in nature and considered at the merits stage of ICSID arbitration. The next chapter addresses whether a host state can introduce counterclaims to provide a secure legal foundation for a host state human rights defence.

5. THE LEGAL FOUNDATIONS OF A SUBSTANTIVE HOST STATE HUMAN RIGHTS DEFENCE IN ICSID ARBITRATION

5.1 INTRODUCTION

The potential legal foundations for a procedural host state human rights defence do not display the attributes that would result in a credible and widely accepted defence in ICSID arbitration. Consequently, it is necessary to consider how a substantive host state human rights defence might operate. A substantive host state human rights defence has a different purpose to a procedural defence. Rather than attempting to prevent a hearing on the merits of the dispute, a substantive defence enables a host state to argue at the merits stage of ICSID arbitration that their conduct does not give rise to international liability for breaching the IIA, or alternatively, counters the merits of the foreign investor's claim. The justification for the host state's position would be established by reference to substantive obligations sourced from international human rights law.

Given that a substantive host state human rights defence requires a host state to introduce international human rights law at the merits stage of ICSID proceedings, the structure of this defence is more complex than a procedural defence. This is because, in effect, a substantive host state human rights defence seeks to expand the jurisdiction of an ICSID arbitral tribunal from its traditional focus on international investment law to encompass arguments based on international human rights law. As a result, for a host state to introduce a human rights argument before an ICSID arbitral tribunal, a suitable procedural basis for the human rights claim must be identified. Additionally, the ICSID arbitral tribunal must then be able to apply international human rights law to the dispute. It is only if both of these components can be established that a substantive host state human rights defence has a legal foundation in ICSID arbitration.

This chapter argues that counterclaims procedures in ICSID arbitration are the best mechanism to establish the legal foundations of a substantive host state human rights defence in specific circumstances. To determine how a substantive host state human rights defence can be established, this chapter initially outlines the shortcomings of substantive defences traditionally used in public international law

and ICSID arbitration. The chapter then proceeds to justify the use of counterclaims as the basis of the host state human rights defence before examining the application of counterclaim procedures in ICSID arbitration. In particular, it sets out the prerequisites for the invocation of a counterclaim by a host state and identifies how a host state would need to present their argument to comply with these requirements. Finally, the role of applicable law in ICSID arbitration is discussed, together with the ability of an ICSID arbitral tribunal to apply international human rights law as part of an investment dispute. Based on each of these considerations, conclusions are then drawn regarding the viability of the use of counterclaims as the legal basis for a host state human rights defence.

5.2 THE FAILINGS OF EXISTING DEFENCES IN ICSID ARBITRATION

To establish the most viable means of introducing a substantive host state human rights defence into ICSID arbitration, it is necessary to review the potential methods by which international human rights law can be brought before an ICSID arbitral tribunal. This section outlines why existing forms of substantive defence available to host states in ICSID arbitration are unable to provide a tenable foundation for a host state human rights defence before proposing counterclaims as an alternative procedural basis. This analysis is undertaken by reference to three potential means by which a host state human rights defence might operate. These are, firstly, by precluding liability for a wrongful act of a state; secondly, through a host state seeking to negate a foreign investor's claim on its merits by justifying its conduct on public policy grounds; and finally, via a host state responding to a foreign investor's claim by initiating a claim against the foreign investor in response. Whilst the latter two options do not act as a true defence by precluding liability for the wrongful act of the host state, they do permit a host state to challenge the foreign investor's claims and, as such, are considered to operate as a form of defence. Each of these alternatives will be discussed in turn so as to identify the legal basis on which the host state human rights defence can best function within the existing framework of public international law.

5.2.1 Circumstances Precluding Wrongfulness

When states breach obligations in international law, their conduct is deemed to be internationally wrongful¹ and state responsibility for the violation ensues.² However, justifications or excuses³ may preclude the wrongfulness of the state's act that gave rise to the violation and thereby preclude the responsibility of the state.⁴ The circumstances in which a state will not be deemed to be responsible for a breach of public international law (known as circumstances precluding wrongfulness) are set out in the ILC Articles for the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and encompass consent, self-defence, countermeasures, *force majeure*, distress and necessity.⁵

Should a state successfully invoke a circumstance precluding wrongfulness, it will not be held internationally responsible for the period of time during which the circumstance exists.⁶ As the obligation resumes once the circumstances ceases to apply,⁷ it is implicit that circumstances precluding wrongfulness only limit a state's liability and do not have the effect of terminating the obligation that has been violated.⁸ As the circumstances precluding wrongfulness are formulated as secondary rules of public international law⁹ (only addressing the consequences of violations of public international law) they are structured so as to apply to breaches

¹ J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) Article 2; J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 275.

² Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) Article 1; Crawford, *State Responsibility: The General Part* (n 1) 275. See I Brownlie, *System of the Law of Nations: State Responsibility Part I* (Clarendon Press 1983) 26 - 31.

³ As to the distinctions between these terms see V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 *European Journal of International Law* 405; Crawford, *State Responsibility: The General Part* 278 - 280.

⁴ Crawford, *State Responsibility: The General Part* (n 1) 275.

⁵ ILC Articles for on Responsibility of States for Internationally Wrongful Acts Articles 20 - 26 in Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) 163 - 188.

⁶ Crawford, *State Responsibility: The General Part* (n 1) 281.

⁷ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) Article 27(a).

⁸ Crawford, *State Responsibility: The General Part* (n 1) 281. See *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, 63.

⁹ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) 75. For further discussion regarding the distinction between primary and secondary rules in this context, see J Combacau and D Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 *Netherlands Yearbook of International Law* 81 and U Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology - The Role of Language for an Understanding of the International Legal System' (2009) 78 *Nordic Journal of International Law* 53.

of obligations sourced from any regime within public international law (subject to their exclusion by a *lex specialis* regime).¹⁰

If a host state human rights defence could be based on a circumstance precluding wrongfulness, it has the potential to result in a host state being excused for breaching investment protection standards in an IIA for the duration of the foreign investor's violation of international human rights law. This would give full effect to the intentions behind the establishment of the host state human rights defence. However, whether this can be achieved is contingent on the manner in which the circumstances precluding wrongfulness are implemented within the international investment law regime (and ICSID arbitration more generally) and how this application can be translated to the operation of a host state human rights defence. This section addresses whether each circumstance is capable of fulfilling this purpose. Brief consideration is also given to the notion of the *exceptio inadimpleti contractus* to see if this may provide an alternative basis to preclude liability.

The circumstance of *force majeure* is set out in Article 23 ARSIWA. *Force majeure* refers to situations in which the state's act is as a result of 'an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstance to perform the obligation'.¹¹ The commentary to Article 23 ARSIWA stresses the need for state to be 'compelled' to act in a manner contrary to the obligation imposed upon it by public international law.¹² In this sense, the state is acting involuntarily.¹³ This threshold would be very difficult to establish in the context of the host state human rights defence. In the circumstances considered in this thesis, the host state is bound by obligations sourced in both the international investment law and international human rights law regimes. When these obligations conflict, the decision as to which obligation should be prioritised is left to the host state. They are not compelled to act in a particular manner and, as such, the conduct that gives rise to the violation of the IIA would be deemed to be voluntary. Further, the additional elements of *force majeure* are unlikely to be met

¹⁰ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) Article 55.

¹¹ Ibid Article 23.

¹² Ibid 170; S Szurek, 'Force Majeure' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 477.

¹³ Crawford, *State Responsibility: The General Part* (n 1) 295.

including that the State has not voluntarily undertaken the risk of an event occurring¹⁴ or that the breach is not caused by the conduct of the state in question.¹⁵ The risk of international human rights law violations is present in relation to FDI within a host state's jurisdiction and the conduct of the foreign investor is under the control of the host state by virtue of the host state's domestic law. Given the combination of these factors, it is highly unlikely that the host state will be able to establish that *force majeure* would preclude the wrongfulness of its act.

Similarly, given the nature of the host state human rights defence, distress would also be very difficult to prove. What amounts to distress is set out in Article 24 ARSIWA. Circumstances involving distress relate to the saving of human life that is entrusted to the care of the author of the act.¹⁶ Whilst violations of international human rights law can give rise to danger to human life,¹⁷ the scope of Article 24 ARSIWA is intended to be limited to life-threatening situations where there are 'no other reasonable' means of saving lives.¹⁸ Although not limited in factual scope,¹⁹ distress has traditionally been applied to situations involving aircraft or ships entering the territories of other States in order to save human life.²⁰

When considered in the context of the host state human rights defence, distress is unlikely to apply. Even if gross violations of international human rights law have occurred, it would be difficult for a host state to successfully argue that a violation of the applicable IIA is the only reasonable means of saving human life. This is because the effect of violating the terms of the IIA by itself, without additional action to directly counter the breach of international human rights law, would not to save human life. Unless the requirements of Article 24 ARSIWA directly apply to the individual instances in question, it is improbable that either distress could form the basis of the host state human rights defence in order to preclude liability in public international law.

¹⁴ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) Article 23(2)(b).

¹⁵ Ibid Article 23(2)(a).

¹⁶ Ibid Article 24; Szurek, 'Distress' (n 12) 482.

¹⁷ For example, a violation of the prohibition on torture could endanger life depending on the form of torture used.

¹⁸ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) 174; Szurek, 'Distress' (n 12) 483.

¹⁹ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) 175.

²⁰ Ibid; Szurek, 'Distress' (n 12) 485.

It is doubtful whether self-defence, as set out in Article 21 ARSIWA has the capacity to enable the host state human rights defence to preclude liability in public international law. Article 21 ARSIWA links the notion of self-defence to that set out in Article 51 of the UN Charter.²¹ Through this reference, this circumstance has limited applicability to a host state human rights defence given Article 21 ARSIWA's focus on instances involving the use of force under Article 2(4) of the UN Charter and breaches of international obligations 'related to the breach of that provision'.²² As armed conflict (and other similar conduct) falls outside of the scope of the proposed operation of the host state human rights defence, self-defence under Article 21 ARSIWA will not be considered in any further detail for the current purposes.

The role of consent in establishing a host state human rights defence that precludes liability in international law is also dubious. Article 20 ARSIWA precludes liability when consent is granted provided the act in question falls within the scope of the consent.²³ For an analogous principle to apply with regard to a host state human rights defence, the foreign investor would have to agree that a host state may violate the applicable IIA in instances where the foreign investor, or the investment, has caused large scale or persistent violations of international human rights law. This consent is highly unlikely to be given. At present, there are no clauses, either express or implied, within IIAs that fully address international human rights law (discussed in Chapter 3), let alone, confer this consent. It would be in extremely rare circumstances that a foreign investor would give consent in the manner required so as to provide a host state human rights defence with the ability to preclude liability in public international law.

Article 22 ARSIWA provides that countermeasures may preclude state liability for wrongful acts. The conditions imposed on countermeasures are set out in

²¹ Crawford, *State Responsibility: The General Part* (n 1) 289; J-M Thouvenin, 'Self-Defence' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 461 – 462. See generally A Abass, 'Consent Precluding State Responsibility: a critical analysis' (2004) 53 *International and Comparative Law Quarterly* 211.

²² Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) 166.

²³ Crawford, *State Responsibility: The General Part* (n 1) 283, 286 – 287; AB Mansour, 'Consent' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 444; see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, 198 – 199.

chapter II of Part Three of ARSIWA. Countermeasures permit a state to undertake an internationally wrongful act to induce another state to comply with their obligations, to cease the violation or make reparation for the damage suffered.²⁴ The use of countermeasures is subject to several limitations, including that they should not affect third parties.²⁵ At first glance, countermeasures appear to provide a potential foundation for a host state human rights defence in these instances. The host state is responding to a violation of international human rights law committed by the foreign investor, and, by breaching the terms of the IIA, are encouraging the foreign investor to comply with its obligations. However, the nature of the relationship between the foreign investor, the host state and the home state in international investment law complicates the initial simplicity that underlies this approach.

In accordance with the conception of public international law adopted in this thesis, foreign investors are only conferred rights through state consent. In the context of an IIA, this means that the parties to the IIA (both with full international legal personality) are the host state and the home state. Foreign investors are only conferred with the ability to commence legal proceedings against the host state in the circumstances set out in the IIA.²⁶ Therefore, in the context of countermeasures, the primary obligations remain focused on the legal relationship between the host state and the home state.²⁷ Should the host state take countermeasures against the foreign investor, it is arguable that the countermeasure is impacting a third party, which would render the countermeasure in breach of the conditions set out in ARSIWA.²⁸ Although this is only one interpretation of how countermeasures might operate in the context of international investment law,²⁹ it raises doubts as to the stability of adopting countermeasures as the basis of the host state human rights defence in the

²⁴ ME O'Connell, 'Controlling Countermeasures' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005) 50-51; H Lesaffre, 'Countermeasures' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 469- 470; Crawford, *State Responsibility: The General Part* (n 1) 685.

²⁵ Crawford, *State Responsibility: The General Part* (n 1) 687

²⁶ Z Douglas, 'Investment Treaty Arbitration and ICSID' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 819.

²⁷ M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 *European Journal of International Law* 617, 632.

²⁸ Ibid.

²⁹ See *ibid.*

long term. As set out in Chapter 3, a clear and accepted legal foundation for the host state human rights defence is necessary for its widespread adoption.

It is unclear whether necessity under Article 25 ARSIWA,³⁰ or within an IIA, can form a credible legal foundation for a host state human rights defence. As can be seen from Chapter 3, Argentina's human rights defences based on both customary and treaty based necessity defences were applied inconsistently by ICSID arbitral tribunals despite the similar factual scenarios in each dispute. The varied outcomes in these decisions suggests that a state of necessity defence can not be applied systematically, reducing the potential credibility of a host state human rights defence. Further, to evidence a state of necessity, a host state has to meet a very high threshold.³¹ The financial crisis in Argentina in 2001/2 was on a nation wide scale.³² Despite the extent of the economic collapse, very few arguments based on necessity succeeded.³³ Most violations of international human rights law by a foreign investor will not place the existence of the host state in peril to the same degree as Argentina's financial crisis, thereby precluding the operation of a state of necessity in almost all cases. Therefore, a state of necessity is discounted from forming the legal foundation for a host state human rights defence.

The general application of the circumstances precluding wrongfulness in ARSIWA means that variations arise regarding the manner in which the circumstances translate into different regimes in public international law. Consequently, not all of the circumstances will consistently apply to the international investment law regime. In particular, this is true in relation to *force majeure*, distress and self-defence. Further, the scope of the circumstances precluding wrongfulness such as consent, countermeasures and necessity, even if they apply to the international investment law regime, suffer deficiencies as the basis for a host state human rights defence. Therefore, it does not appear possible for a host state human

³⁰ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) Article 25; see S Heathcote, 'Necessity' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).

³¹ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 1) 183.

³² See L Tedesco, 'Argentina's Turmoil: The Politics of Informality and the Roots of Economic Meltdown' (2010) 15 *Cambridge Review of International Affairs* 469, 470 – 472.

³³ ICSID arbitral tribunals have only found in favour of Argentina on the basis of a state of necessity in *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 and *Continental Casualty Company v. Argentine Republic* ICSID Case No. ARB/03/9, Award, 5 September 2008.

rights defence to preclude liability in international law in relation to the host state's violation of the IIA under ARSIWA.

A further option outside the scope of ARSIWA is the *exceptio inadimpleti contractus*. This principle permits an exception of non-performance based on the other party failing to perform a mutual obligation.³⁴ The *exceptio* functions similarly in this manner to countermeasures, however, as it is based on the notion of reciprocity, the non-performance must be of the same or a closely related obligation.³⁵ Therefore, to function in relation to a host state human rights defence, the conduct of the host state in violating the IIA would have to align with the foreign investors' obligation to comply with international human rights law. Given the asymmetrical nature of IIAs, that obligations are owed between the host state and the home state (rather than directly with the foreign investor) and the lack of any enforceable obligations based on international human rights law being set out in IIAs, it is improbable that the *exceptio* is capable of providing the foundation of the host state human rights defence. This conclusion is exacerbated by its unclear legal basis.³⁶

Although the *exceptio* was considered by the ILC for inclusion in the ARSIWA, it was rejected on the basis that it was most closely linked to the performance of treaty obligations.³⁷ That is, according to the broad interpretation of the *exceptio*, the performance of one state's obligations under a treaty is conditional on similar compliance by the other states party.³⁸ Therefore, failure to comply is a breach of treaty, rather than a matter of state responsibility. However, the VCLT only addresses the permissible responses to material breach of treaties in Article 60

³⁴ J Crawford and S Olleson, 'The Exception of Non-performance: Links between the Law of the Treaties and the Law of State Responsibility' (2000) 21 Australian Yearbook of International Law 55, 56; F Fontanelli, 'The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin' (2012) 1 Cambridge Journal of International and Comparative Law 119, 121 – 122; Crawford, *State Responsibility: The General Part* (n 1) 678.

³⁵ S Forlati, 'Reactions to Non-Performance of Treaties in International Law' (2012) 25 Leiden Journal of International Law 759, 769; Crawford, *State Responsibility: The General Part* (n 1) 678.

³⁶ Crawford, *State Responsibility: The General Part* (n 1) 678.

³⁷ Ibid 681.

³⁸ Crawford and Olleson, 'The Exception of Non-performance: Links between the Law of the Treaties and the Law of State Responsibility' (n 34) 62 – 63; Crawford, *State Responsibility: The General Part* (n 1) 680 – 681.

and does not include the *exceptio*.³⁹ Therefore, having been excluded from both treaty interpretation and state responsibility, the relevance of the *exceptio* in public international law remains contentious.⁴⁰

The ICJ in *Interim Accord*⁴¹ was given the opportunity to consider the legal standing of the *exceptio* but the majority did not elaborate on its legal foundation as this was not required to reach its decision.⁴² Judges Simma and Bennouna were critical of this approach.⁴³ In his separate opinion, Judge Simma focused on the similarity of the *exceptio* to Article 60 VCLT, considering it akin to an issue of treaty performance, which had been fully addressed in Article 60 VCLT as a primary rule of public international law.⁴⁴ In contrast, Judge ad hoc Roucounas considered that the *exceptio* could exist outside the operation of Article 60 VCLT, which only focuses on material breaches of treaty obligations.⁴⁵ Given the ICJ's failure to endorse the *exceptio* in public international law, combined with Judge Simma's denouncement and the ILC's categorisation of the principle as a matter of treaty performance rather than state responsibility, it does not provide a clear basis for the preclusion of liability in public international. Consequently, it is not desirable that the *exceptio* is adopted as the foundation for a working host state human rights defence in light of the need for it to have a clear and well-accepted legal foundation.

In light of the failure of both ARSIWA and the *exceptio* to provide the foundation for a host state human rights defence, there is little chance that the host state human rights defence will be able to function by precluding the liability of host states for their acts that violate the applicable IIA (despite the acts being undertaken in compliance with international human rights law). Therefore, alternative means by which the host state human rights defence might minimise the liability of the host state need to be addressed.

³⁹ Crawford and Olleson, 'The Exception of Non-performance: Links between the Law of the Treaties and the Law of State Responsibility' (n 34) 56;

⁴⁰ Ibid; Fontanelli (n 34) 128 – 129;

⁴¹ *Application of the Interim Accord (The Former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644.

⁴² Ibid, 691.

⁴³ *Application of the Interim Accord (The Former Yugoslav Republic of Macedonia v Greece)* (Separate Opinion of Judge Simma) [2011] ICJ Rep 644, 697; *Application of the Interim Accord (The Former Republic of Yugoslavia v Greece)* (Declaration of Judge Bennouna) [2011] ICJ Rep 644, 709.

⁴⁴ *Application of the Interim Accord (The Former Yugoslav Republic of Macedonia v Greece)* 704.

⁴⁵ *Application of the Interim Accord (The Former Yugoslav Republic of Macedonia v Greece)* (Dissenting Opinion of Judge Ad Hoc Roucounas) [2011] ICJ Rep 644, 746.

5.2.2 Justifications for Host State Conduct Based on Public Policy Grounds

Most defences to claims brought by foreign investors in ICSID arbitration have involved host states justifying their conduct based on public policy considerations. This is because disputes in relation to the international investment law regime focus on whether state conduct that seeks to achieve a public purpose has breached an investment protection standard.⁴⁶ Therefore, host states tend to seek to justify their position by reference to the public policy that they sought to achieve. Host state arguments based on public policy may be made in general terms or relate to the specific terminology of the investment protection standard set out in the IIA. For example, regulatory powers may be raised in relation to an allegation of a breach of the fair and equitable treatment standard,⁴⁷ or may refer to a precise element of a standard, such as the need for an expropriation to be conducted for a public purpose.⁴⁸ As a result, arguments based on public policy considerations do not have a clear legal basis in the ICSID Convention or the ICSID Arbitral Rules. This attribute was identified in Chapter 3 as a desirable characteristic in a host state human rights defence. Therefore, the attractiveness of adopting this approach is lessened.

Additionally, ICSID arbitral tribunals have displayed a propensity to dismiss public policy considerations. For example, as previously stated in Chapter 3, Argentina sought to justify violations of the USA-Argentina BIT by reference to the constitutional character of international human rights law under Argentinian law. This defence was unsuccessful in both the *Siemens v Argentina* and *Azurix v Argentina* awards as the defence was not fully established. As set out in Chapter 3, this is likely to be due to host state reluctance to argue international human rights law before an ICSID arbitral tribunal for fear of dual liability. Whilst states have been reluctant to argue some public policy defences, ICSID arbitral tribunals have also been reluctant to consider their defences. In *Tecmed v Mexico*,⁴⁹ Mexico's

⁴⁶ See J Delaney and D Barstow Magraw, 'Procedural Transparency' in PT Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 723.

⁴⁷ See, for example, *Marion Unglaube and Reinhard Unglaube v. Costa Rica* ICSID Case No. ARB/08/1 and ARB/09/20 Award, 16 May 2012 [246].

⁴⁸ See, for example, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 [122]

⁴⁹ *Ibid.*

failure to re-new a licence for the operation of a hazardous waste landfill site was deemed to amount to an expropriation⁵⁰ despite Mexico seeking to justify its conduct by reference to the foreign investor's violations of environmental law.⁵¹ The ICSID arbitral tribunal applied proportionality analysis and reasoned that Mexico had acted disproportionately in response to the minimal violations of environmental law.⁵² Finally, in *Santa Elena v Costa Rica*,⁵³ the issue before the ICSID arbitral tribunal was the amount of compensation payable by Costa Rica for the expropriation of the foreign investor's land.⁵⁴ Costa Rica expropriated the land to establish a nature reserve.⁵⁵ When discussing the impact of the environmental justification, the ICSID arbitral tribunal stated:

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.⁵⁶

In light of the lack of a clear legal basis for public policy considerations in ICSID arbitration, and the dismissal of these arguments by ICSID arbitral tribunals, a host state human rights defence based solely on public policy grounds does not appear to be a plausible option.

5.2.3 Establishing a Host State Claim Against the Foreign Investor

A final option that may provide a foundation upon which a host state human rights defence can operate is by the host state arguing that the foreign investor's claim should be balanced against the foreign investor's violations of international human rights law. This could be achieved by two means, either by way of a set-off or by a counterclaim. Although both concepts are very similar, there are fundamental differences in the manner in which they operate.

⁵⁰ Ibid [151].

⁵¹ Ibid [99] ff.

⁵² Ibid [149].

⁵³ *Compania Del Desarrollo De Santa Elena, S.A. v. Costa Rica* ICSID Case No. ARB/96/1, Final Award, 17 February 2000.

⁵⁴ Ibid [19].

⁵⁵ Ibid [18].

⁵⁶ Ibid [72].

A set-off provides a true defence against a claim.⁵⁷ It is premised on the defending party seeking a reduction in compensation based on a pre-existing obligation.⁵⁸ The set-off is linked to the originating claim and can only reduce the amount of compensation that may be payable.⁵⁹ The amount of the set-off cannot exceed the amount of the originating claim.⁶⁰ If the originating claim is unsuccessful, the set-off falls away and nothing will be awarded to the defending party on the basis of the set-off.⁶¹

In contrast, a counterclaim can be applied to counteract any originating claim.⁶² It is an independent claim rather than acting as a defence.⁶³ The tribunal hearing the claim is able to balance the amounts owed by each disputing party.⁶⁴ Therefore, if the amount of award under the original claim is less than a successful counterclaim, the party with the originating claim would owe the defending party the amount required to make up the value of the counterclaim. As the claims are distinct, even if the originating claim is unsuccessful, a successful counterclaim would still stand and compensation would be owed to the defending party.⁶⁵

Counterclaims appear to provide more flexibility and adaptability for the operation of a host state human rights defence. The independent nature of the claim would permit a host state to establish a claim against the foreign investor based on violations of international human rights law that would not be constrained by the value of the foreign investor's claims. In instances where a grave violation of international human rights law has resulted, the costs of remedying this violation may exceed the value of the loss to the foreign investor. A counterclaim would 'facilitate the assessment of damages and the calculation of countervailing

⁵⁷ KP Berger, 'Set-off in International Economic Arbitration' (1999) 15 *Arbitration International* 53, 60; A Mourre, 'The Set-Off Paradox in International Arbitration' (2008) 24 *Arbitration International* 387, 387.

⁵⁸ Mourre (n 57) 387 – 388; AK Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 *Lewis and Clark Law Review* 461, 465.

⁵⁹ Berger (n 57) 60.

⁶⁰ *Ibid* 61.

⁶¹ *Ibid* 60.

⁶² *Ibid*

⁶³ A Dundes Renteln, 'Encountering Counterclaims' (1987) 15 *Denver Journal of International Law and Policy* 379, 380; Berger (n 57) 60

⁶⁴ TW Walde and B Sabahi, 'Compensation, Damages and Valuation' in PT Muchlinski, F Ortino and C Schreuer (eds), *Handbook of International Investment Law* (Oxford University Press 2008) 1097-98; H Brubowski, 'Balancing IIA Arbitration Through the Use of Counterclaims' in A De Mestral and C Levesque (eds), *Improving International Investment Agreements* (Taylor and Francis 2013) 217.

⁶⁵ Berger (n 57) 60.

damages'⁶⁶ in turn, permitting a host state to receive a full remedy for its loss. This would also be the situation if the foreign investor's claim fails because the host state would be permitted to continue with its claim. Conversely, if set-off was relied upon as the basis of the defence, the host state may not receive a full remedy. Given that the liability of the host state cannot be precluded in accordance with public international law, this would be the most beneficial option for the host state to fully defend their conduct.

This approach to the host state human rights defence means that the host state's liability in public international law will not be precluded. However, by using counterclaims as the basis of the host state human rights defence, the host state can potentially seek redress for the foreign investor's conduct that is in breach of international human rights law through the award of compensation. Counterclaims permit the host state to be fully compensated for their loss without reference to the amount being claimed by the foreign investor. These factors make counterclaims more attractive for host states than a defence based on set-off and will be used as the foundation for the host state human rights defence.

5.2.4 Preliminary Conclusion

Establishing a host state human rights defence in ICSID arbitration requires the host state to either preclude liability for its violation of the applicable IIA, use policy justifications to support its breach, or claim against the foreign investor. Preventing the liability of the host state in accordance with the circumstances precluding wrongfulness set out in ARSIWA or the *exceptio* do not provide viable foundations for a host state human rights defence given their tenuous connections to both international investment law and the envisaged operation of the host state human rights defence. Policy based defences have consistently been rejected by ICSID arbitral tribunals. Therefore, counterclaims provide the most viable option as they provide the host state with the most flexibility and protection. However, the manner in which counterclaims operate needs to be translated into the framework of ICSID arbitration.

⁶⁶ Bjorklund (n 58) 475.

5.3 THE APPLICATION OF ICSID COUNTERCLAIM PROCEDURES

This section examines how ICSID counterclaims may overcome the difficulties evidenced by both circumstances precluding wrongfulness and policy based defences and how they provide a mechanism by which a functional host state human rights defence can be formulated. To establish the viability of counterclaims as the foundation for a host state human rights defence, this section initially describes counterclaim procedures in ICSID arbitration and justifies their use as the procedural basis for a host state human rights defence. The section then proceeds to outline the elements that a host state will need to establish to argue a counterclaim based on international human rights law.

5.3.1 Justifications for the Use of ICSID Counterclaim Procedures

Counterclaim procedures permit a host state to commence a claim against the foreign investor for violations of obligations owed by the foreign investor to the host state.⁶⁷ The introduction of counterclaims was intended to provide balance to ICSID arbitration by ensuring equality between the disputing parties with regard to the ability to initiate claims.⁶⁸ It was recognised in *SGS v Pakistan* that:

It would be inequitable, if, by reason of the invocation of ICSID jurisdiction, the [foreign investor] could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the [host state] from pursuing its own claim for damages [...].⁶⁹

This approach reflects the views of the drafters of the ICSID Convention who intended its provisions to permit claims from both host states and foreign investors.

This is made clear in the Report of the Executive Directors, which states:

While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the

⁶⁷ Y Kryvoi, 'Counterclaims in Investor-State Arbitration' (2012) 21 Minnesota Journal of International Law 216, 220.

⁶⁸ A Vohryzek-Griest, 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure' (2009) 15 International Law, Revista Colombiana de Derecho Internacional 83, 87 – 88; G Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1 Journal of International Dispute Settlement 97, 103; Kryvoi (n 67) 220.

⁶⁹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* ARB/01/13, Procedural Order No. 2, 16 October 2002 [41].

Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.⁷⁰

The introduction into ICSID arbitration of a counterclaim mechanism was also intended to increase the efficiency of dispute resolution between foreign investors and host states.⁷¹ By addressing all investment related claims in one forum simultaneously, the need for the host state to commence proceedings in alternative dispute resolution fora, such as domestic courts, could be minimised.⁷² This in turn reduces the time and cost involved in duplicitous proceedings.⁷³

The intentions behind counterclaims were given effect in Article 46 of the ICSID Convention, which permits counterclaims in the following circumstances:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Rule 40(1) of the ICSID Arbitral Rules reinforces this provision in identical terms.⁷⁴

As counterclaim procedures are sourced from the ICSID Arbitral Rules, they have been accepted by states as forming part of ICSID arbitral practice and have a clear legal foundation. This meets a key criterion of the attributes sought in a host state human rights defence identified in Chapter 3. Given their origins in the ICSID Arbitral Rules, the risk of an ICSID arbitral tribunal dismissing a counterclaim for not falling within its powers is reduced. This satisfies the requirement that arbitrators that prefer a 'private' approach to ITA will be amenable to the use of the host state human rights defence. By seeking to avoid the duplication of proceedings in multiple fora, counterclaims also support the 'de-fragmentation' of public international law. Although initially intended to avoid domestic proceedings, this policy basis can

⁷⁰ ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States' <<https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>> accessed 15 July 2013.

⁷¹ Kryvoi (n 67) 221.

⁷² Ibid; *Spyridon Roussalis v. Romania* ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, 7 December 2011.

⁷³ Kryvoi (n 67) 221.

⁷⁴ This states '[e]xcept as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre'.

equally be applied to other specialist dispute resolution bodies, thereby reducing the risk of dual liability for host states in human rights dispute resolution fora. When compared to the characteristics of the investment law driven and public international law defences set out above, counterclaim procedures in ICSID arbitration are a more desirable option as they possess the attributes sought in a host state human rights defence. These attributes are that the defence should be established outside of the terms of the IIA, that it exists in ICSID arbitral practice, minimises the risk of dual liability for host states and that it can be augmented by *amicus curiae* procedures. Given these attributes, counterclaims will be adopted as the procedure by which international human rights law is introduced into ICSID arbitration. However, it is necessary to examine the application of counterclaims to ensure that host states can utilise this procedural basis in the manner envisaged.

5.3.2 The Application of ICSID Counterclaim Procedures

The terms of Article 46 ICSID Convention and Rule 40(1) of the ICSID Arbitral Rules dictate how a host state would be able to rely on this mechanism to establish a host state human rights defence. These provisions set out three elements that a host state must address to argue a counterclaim. First, the arbitral tribunal needs to have jurisdiction over the counterclaim. Second, the consent given by both the host state and foreign investor must encompass the possibility of counterclaims. Finally, there has to be a sufficient degree of proximity between the foreign investor's claim and the counterclaim. In addressing how these elements apply to a host state human rights defence, initial focus will be placed on the element of party consent. The nexus between international investment law and international human rights law will then be discussed by reference to the ICSID arbitral tribunal's subject matter jurisdiction over the counterclaim.

Additionally, implicit within these provisions is that the foreign investor must owe legal obligations to the host state to form the substantive basis of the counterclaim. Therefore, the specific circumstances in which a foreign investor may owe obligations to a host state in the context of international human rights law are considered as the final stage of this analysis.

5.3.2.1 Party Consent to Counterclaims

Prior to the invocation of counterclaim procedures, the disputing parties must consent to their use. Although the ICSID Convention and ICSID Arbitral Rules permit counterclaims, whether they can be applied by an ICSID arbitral tribunal in a given dispute is dictated by party consent. This requirement of Article 46 ICSID Convention reflects the need for dual consent when establishing jurisdiction in ICSID arbitration as established in Chapter 4. Whether counterclaims will be permitted depends on the terms of the mutual consent of the foreign investor and the host state that establishes the initial jurisdiction of the ICSID tribunal.

The consent of the parties will usually extend to counterclaims unless expressly excluded.⁷⁵ Whether this is the case is a matter of interpretation.⁷⁶ When interpreting the scope of the consent of both parties, tribunals have attempted to undertake this task in a manner that is neither too restrictive nor too broad.⁷⁷ However, some tribunals have interpreted consent liberally.⁷⁸ Lalive and Halonen suggest that tribunals should ‘scrutinise’ the terms of party consent,⁷⁹ to ensure that consent is definitively established.⁸⁰ As a result, it is difficult to declare with certainty whether particular forms of consent will permit counterclaims. Hence, in this discussion, generalisations will be made to illustrate the potential outcomes

⁷⁵ Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 256. See also B Larschan and G Mirfendereski, 'The Status of Counterclaims in International Law, with Particular Reference to International Arbitration Involving a Private Party and a Foreign State' (1986) 15 *Denver Journal of International Law and Policy* 11; PA Karrer, 'Jurisdiction on Set-off Defences and Counterclaims' (2001) 67 *Arbitration* 176 who argues at 177 that ‘an arbitral tribunal should have jurisdiction over counterclaims between the same parties, even if these counterclaims are not covered by the arbitration agreement which confers jurisdiction on the arbitral tribunal over the main claim.’

⁷⁶ P Lalive and L Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' (2011) II *Czech Yearbook of International Law* 141, 149.

⁷⁷ See, for example *El Paso Energy International Company v. Argentine Republic* ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 [70]; S Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration' (2011) 10 *Washington University Global Studies Law Review* 419; C Schreuer, 'Consent to Arbitration' <http://www.univie.ac.at/intlaw/con_arbitr_89.pdf> accessed 15 July 2013, 35 – 38.

⁷⁸ Consent was evidenced by reference to an approved investment application in *Amco Asia Corporation and others v. Republic of Indonesia* ICSID Case No. ARB/81/1, Second Arbitral Award, 31 May 1990 available at 1 ICSID Reports 463; see also *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [116]. See U Grusic, 'The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes' (2009) 10 *Journal of World Investment and Trade* 69, 74.

⁷⁹ See Lalive and Halonen (n 76) 146.

⁸⁰ PM Blyschak, 'State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases' (2009) 9 *Asper Review of International Business and Trade Law* 99, 130; Laborde (n 68) 106.

based on descriptions of the prevalent forms of party consent outlined in Chapter 4. The common forms of party consent are for the parties to agree to ‘all’ or ‘any’ investment disputes being heard by way of ICSID arbitration,⁸¹ to limit consent to disputes regarding the investment authorisation, the investment agreement or the IIA,⁸² to limit the subject matter jurisdiction of an ICSID arbitral tribunal to disputes over IIAs alone,⁸³ or to limit consent to disputes over the quantum of compensation following an expropriation.⁸⁴

The starting premise is that, the wider the terms of the consent given, the more likely it is that an ICSID arbitral tribunal will extend jurisdiction to host state counterclaims. Consequently, consent phrased in terms such as ‘any’ or ‘all’ disputes are likely to extend jurisdiction to counterclaims.⁸⁵ The UNCITRAL tribunal in *Saluka v Czech Republic*⁸⁶ considered party consent in these terms. Although proceeding under the UNCITRAL Rules as opposed to the ICSID Arbitral Rules, as this tribunal was the first award to fully review jurisdiction over counterclaims, the tribunal proceeded to establish how this was customarily achieved by reference to the UNCITRAL and ICSID Arbitration Rules.⁸⁷ The tribunal was required to decide whether the consent of the parties, based on Article 8 of the Netherlands/Czech Republic BIT, was sufficient to permit a host state counterclaim. The provision conferred jurisdiction over ‘any legal dispute between a Contracting Party and an investor of the other Contracting Party concerning an investment of the latter’. In deciding that the tribunal’s jurisdiction extended to host state counterclaims, the arbitral tribunal reasoned that:

The language of Article 8, in referring to “All disputes,” is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal’s jurisdiction, to be “between a Contracting Party and an investor of the other Contracting Party” carries with it no

⁸¹ Douglas, *The International Law of Investment Claims* (n 75) 234.

⁸² Ibid 234 – 235.

⁸³ Ibid 235.

⁸⁴ Ibid.

⁸⁵ Ibid 257, 258; Lalive and Halonen (n 76) 146;

⁸⁶ *Saluka Investment B.V. v. Czech Republic* UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004.

⁸⁷ Ibid [61].

implication that Article 8 applies only to disputes in which it is an investor which initiates the claims.⁸⁸

Therefore, consent in terms that refer to ‘all’ or ‘any’ disputes is likely to encompass counterclaims. This gives rise to the possibility of a host state human rights defence being established when party consent is conferred in this manner.

Second, consent that limits an ICSID arbitral tribunal’s jurisdiction to legal actions that relate to ‘an investment authorization, an investment agreement or an alleged breach of any right conferred’ by an investment treaty, may limit the scope of counterclaims.⁸⁹ The impact of this type of clause was examined in *Goetz v Burundi*.⁹⁰ Article 8 of the Belgium-Luxembourg-Burundi BIT limited the jurisdiction of the ICSID arbitral tribunal to disputes concerning the interpretation and application of investment agreements, investment authorisations and alleged violations of rights under the BIT with regards to investments. However, rather than interpreting the specific terms of the consent agreed between the disputing parties as set out in this provision of the IIA, the tribunal focused on the initial consent given by the foreign investor to ICSID arbitration, evidenced by its initiation of ICSID arbitration.⁹¹ Thus, the ICSID arbitral tribunal identified a different source of party consent to that found in Article 8 of the applicable BIT. It was the tribunal’s view that the foreign investor’s acceptance of the host state’s standing offer of ICSID arbitration was sufficient to include the powers of ICSID arbitral tribunals to hear counterclaims in the absence of any express exclusion.⁹² By circumventing the need to rely upon the more limited terms of Article 8, the tribunal held that it could hear the counterclaim.⁹³ This outcome differs to the position that would likely be taken if the terms of Article 8 had been applied. By virtue of the parties limiting the scope of jurisdiction to the particular legal instruments listed, the ICSID tribunal would not have been able extend jurisdiction beyond the specific terms of those instruments.

The focus of this tribunal on the foreign investor’s acceptance of a standing offer to proceed to ICSID arbitration is significant for the introduction of a host state

⁸⁸ Ibid [39].

⁸⁹ Douglas, *The International Law of Investment Claims* (n 75) 234 – 235.

⁹⁰ *Antoine Goetz and others v. Republic of Burundi [II]* ICSID Case No. ARB/01/2, Award, 21 June 2012.

⁹¹ Ibid [278].

⁹² Ibid.

⁹³ Ibid [281].

human rights defence. When party consent is limited to particular instruments, any host state counterclaim must relate to the obligations set out in one of those instruments.⁹⁴ Given the general lack of references to international human rights law in investment agreements, investment authorisations or IIAs, provisions such as Article 8 are likely to exclude the operation of a host state human rights defence based on counterclaims. Conversely, if these instruments do not form the limit of an ICSID arbitral tribunal's jurisdiction over counterclaims, a host state human rights defence becomes a tenable option. This conclusion is dependent on the credibility of the ICSID arbitral tribunal's reasoning in *Goetz v Burundi*.

The reasoning of the tribunal in *Goetz v Burundi* emphasises the desirability of limiting the potential for disputes to be heard by multiple fora.⁹⁵ Whilst this stance is in the interests of justice, it simultaneously undermines the significance of the role of party consent in determining an ICSID arbitral tribunal's jurisdiction over counterclaims. The dual nature of consent is a key attribute of ICSID arbitration and is reflected in Article 46 ICSID Convention by the phrase 'within the scope of the consent of the parties'. Given the positivist conception adopted in this thesis, which prioritises the role of consent, it is posited the approach taken in *Goetz v Burundi* should not be followed to establish a host state human rights defence.

Third, consent in even more limited terms further reduces the probability that a host state human rights defence can be established. Provisions that limit the jurisdiction of an investment tribunal to alleged violations of the IIA only, such as Article 26 of the Energy Charter Treaty, or Articles 1116 and 1117 of NAFTA, are more likely to prevent counterclaims being permitted.⁹⁶ This is because rights are not conferred upon host states in IIAs.⁹⁷ The significance of this distinction was highlighted in *Aguas & Vivendi v Argentina*.⁹⁸ The tribunal contrasted Article 8 of the France Argentina BIT (which provided for '[a]ny dispute relating to

⁹⁴ Douglas, *The International Law of Investment Claims* (n 75) 258.

⁹⁵ See *Antoine Goetz and others v. Republic of Burundi [II]* (n 90) [280].

⁹⁶ For example, Article 26(6) Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 states '[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law. Article See Douglas, *The International Law of Investment Claims* (n 75) 257; Lalive and Halonen (n 76) 147.

⁹⁷ Douglas, *The International Law of Investment Claims* (n 75) 235.

⁹⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002.

investments’) with the operation of Article 11 of the same BIT where consent that was limited to violations of the IIA. The Tribunal stated:

Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relates to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT which refers to disputes ‘concerning the interpretation or application of this Agreement’, or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 ‘a claim that another Party has breached an obligation under’ specified provisions of that Chapter.⁹⁹

A similar internal inconsistency arose in *Hamester v Ghana*.¹⁰⁰ Article 12(1) of the Federal Republic of Germany/Ghana BIT enabled the ICSID tribunal to consider disputes ‘concerning an obligation of [one Contracting Party] under this Treaty in relation to an investment of [a national or company of the other Contracting Party]’. The tribunal noted the ‘restricted scope’ of the consent given, but also took into account that Articles 12(3) and (4) of the BIT recognised ‘that the State party may be “aggrieved” and “shall have the right to refer the dispute to” arbitration’.¹⁰¹ The need to consider the precise scope of consent based on the BIT’s provisions was circumvented¹⁰² as the counterclaim had not been fully developed by way of submissions. Nonetheless, these decisions demonstrate the importance of the manner in which consent is interpreted, and the potential ambiguity that may result from the consent given.

The decision in *Roussalis v Romania*¹⁰³ evidences the potential limiting scope of consent that only confers jurisdiction over disputes regarding the terms of IIAs. At issue was whether Article 9 of the Romania/Greece BIT permitted counterclaims. The terms of Article 9 limited consent to ‘[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former’. Relying on the general rule of treaty interpretation set out in Article 31 VCLT, the majority of the tribunal held that ‘the references made in the text of Article 9(1) of the BIT to

⁹⁹ Ibid [55].

¹⁰⁰ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* ICSID Case No. ARB/07/24, Award, 18 June 2010.

¹⁰¹ Ibid [354].

¹⁰² Lalive and Halonen (n 76) 149.

¹⁰³ *Spyridon Roussalis v. Romania* ICSID Case No. ARB/06/1, Award, 7 December 2011.

“disputes ...concerning an obligation of the latter” undoubtedly limit jurisdiction to claims brought by investors about obligations of the host State’.¹⁰⁴ On the basis that the ‘BIT imposes no obligations on investors, only on contracting States’,¹⁰⁵ the counterclaim was rejected.¹⁰⁶

Although the majority of the *Roussalis* arbitral panel denied the counterclaim, the declaration of the minority arbitrator in *Roussalis*,¹⁰⁷ Reisman, attacked the approach taken by the majority. Reisman’s understanding of the operation of consent under ICSID was that ‘when the State Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue’.¹⁰⁸ Reisman supported his position by reference to policy considerations. He stressed that if the majority view was taken, there would be the need for the host state to pursue its claims in a domestic forum (which the investor had elected to avoid by selecting ICSID arbitration and pursuing a counterclaim).¹⁰⁹ This approach would give rise to duplication, inefficiency and the additional costs.¹¹⁰ He described the majority decision as ‘an ironic, if not absurd, outcome, at odds ... with the objectives of international investment law.’¹¹¹ Reisman’s view informed the position taken by the tribunal in *Goetz v Burundi*. As outlined above, by prioritising policy considerations regarding the need to resolve all aspects of investment disputes by way of ICSID arbitration, the role of consent is minimised, which is contrary to a positivist understanding of public international law. This does not form a suitable basis for a host state human rights defence.

Finally, consent that is limited to issues of the quantum of compensation following an expropriation is the least common and most restrictive form of consent. These provisions were usually included in IIAs in former socialist states.¹¹² For

¹⁰⁴ Ibid [869].

¹⁰⁵ Ibid [871].

¹⁰⁶ Ibid [872].

¹⁰⁷ *Spyridon Roussalis v. Romania* (n 103) Declaration of M Reisman.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Douglas, *The International Law of Investment Claims* (n 75) 250.

example, the China-Hungary BIT 1991 provides sets out consent in Article 10(1) in the following terms:

Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal.

This stance precludes the operation of counterclaims as consent is not given for an ICSID tribunal to review substantive rights and obligations. It is unlikely that a host state human rights defence would be raised in this context, given that it would usually be employed to counter the alleged breach of the investment protection standards, and in this instance, the violation of the investment protection standard has already been established.

These four examples are based on the terms of the consent set out in the host state's standing offer to arbitrate. When accepting the host state's standing offer to resolve disputes through ICSID arbitration, the foreign investor could potentially limit their consent to the ICSID arbitral tribunal only hearing originating claims. This would mean that the parties had not consented to the ICSID arbitral tribunal having jurisdiction over counterclaims. Whether a foreign investor may limit the jurisdiction of the arbitral tribunal at the commencement of proceedings, and if so, the degree to which this is permissible is not clear.¹¹³ It has been suggested that the offer to arbitrate in the BIT must be accepted on its own terms and that a foreign investor cannot exclude counterclaims in its acceptance of the standing offer.¹¹⁴ This position corresponds with the more pragmatic policy view that:

if the parties subsequently are in arbitration or litigation, the jurisdiction of that arbitral tribunal or state court should extend to the counterclaim all the same ... The claimant must be presumed to prefer arbitration before the arbitral tribunal that is already in place, and the respondent must be presumed to prefer that jurisdiction as well, or the respondent would not have brought the counterclaim before that jurisdiction in the first place but would have initiated arbitration or litigation elsewhere.¹¹⁵

¹¹³ See for example, C Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) 746 who states that '[i]f the investor accepts the offer to arbitrate [contained in a BIT] only in respect of its specific claim, consent will be restricted by the terms of the acceptance. If the investor accepts the offer of jurisdiction by instituting proceedings, consent only exists to the extent necessary to deal with the investor's request. But if a counterclaim of the State is closely connected to the investor's complaint, it is arguable that it will be covered by the mutual consent of the parties'.

¹¹⁴ Lalive and Halonen (n 76) 150.

¹¹⁵ Karrer (n 75) 177 – 178.

Therefore, both the manner in which an ICSID arbitral tribunal's jurisdiction is generated, and policy considerations would appear to support the view that a foreign investor cannot limit ICSID arbitration solely to its originating claim when the host state's standing offer is not in those terms. This would prevent a foreign investor from cynically denying the operation of a host state human rights defence by limiting its consent when filing a claim with ICSID.

To establish a host state human rights defence on the basis of counterclaim procedures in ICSID arbitration, party consent should be phrased as widely as possible. Ideally, the jurisdiction of an ICSID arbitral tribunal should extend to 'all' or 'any' disputes relating to the investment. This removes any ambiguity regarding whether a counterclaim based on international human rights law is within the terms of the party consent. As consent is offered in an IIA and exists prior the dispute, foreign investors are deemed to have accepted consent in these terms when initiating ICSID arbitration. Hence, they are unlikely to be able to modify the terms of the consent when filing their claim to avoid the operation of a host state human rights defence. The risk for host states is that by offering consent to arbitrate in wide terms, host states are potentially open to foreign investors initiating more claims against them.

Some arbitrators have extended, or sought to extend, the jurisdiction of an ICSID arbitral tribunal to include all counterclaims despite the terms of party consent within the IIA being phrased in more limited terms. The reasoning underlying this approach has not yet been widely accepted.¹¹⁶ A host state should not rely on all ICSID arbitral tribunals adopting this stance. Given the fundamental nature of party consent to ICSID arbitration, utilising this position would form a questionable foundation for a host state human rights defence. Further, this approach does not align with the positivist viewpoint used in this thesis.

¹¹⁶ *Spyridon Roussalis v. Romania* (n 103) and *Antoine Goetz and others v. Republic of Burundi [II]* (n 90) are the only awards to have taken this approach. Both are recent awards so this approach may be taken in future awards.

5.3.2.2 Nexus between International Investment Law and International Human Rights Law

Even if consent to counterclaims can be established, the failure of states to include international human rights law in IIAs might make it difficult to extend the jurisdiction of the arbitral tribunal to include a host state human rights defence. This is because there is still a requirement that the counterclaim must ‘arise directly out of the subject-matter of the dispute’.

Attempting to extend the jurisdiction of an ICSID tribunal to encompass a substantive host state human rights defence requires that an ICSID arbitral tribunal has subject matter jurisdiction over arguments based on international human rights law. When seeking to extend the subject matter jurisdiction of ICSID arbitral tribunals to include international human rights law:

The party to a dispute invoking a human rights argument – be it the state or the investor – must demonstrate substantively that the human rights at issue effectively impact on the implementation of the investment at stake. This constraint is explained by the fact that the arbitrator’s jurisdiction is specifically limited to the settlement of disputes arising out of a given international investment.¹¹⁷

Consequently, any attempt to extend the jurisdiction of an ICSID tribunal must align with the international investment law focus that is inherent within the ICSID dispute resolution system. Thus, to determine if an ICSID arbitral tribunal’s jurisdiction over counterclaims extends to international human rights law, this section examines whether a sufficient nexus can be established between the investment dispute and the host state human rights defence under both Article 25 and Article 46 ICSID Convention. Article 25 ICSID Convention refers to the ICSID arbitral tribunal’s originating jurisdiction whereas Article 46 ICSID Convention deals specifically with the subject matter of counterclaims. Both provisions need to be considered as Article 46 ICSID Convention requires that the counterclaim fall within ICSID’s originating jurisdiction (which is governed by Article 25 ICSID Convention) and additionally relates to the subject matter of the dispute.

¹¹⁷ P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 61 – 62.

Article 25 ICSID Convention only confers originating jurisdiction to an ICSID arbitral tribunal in relation to a ‘legal dispute arising directly out of an investment’. As discussed in Chapter 4, principles of law that are generally applicable to investments, such as tax laws, fall outside of ICSID’s jurisdiction. However, when these laws are applied directly to the investment, they are capable of falling within ICSID’s jurisdiction. Therefore, international human rights law (as a law of general application) will not fall within ICSID’s jurisdiction unless it is used by a host state specifically in relation to an investment. It is submitted that in the limited circumstances addressed in this thesis, that is, instances of IIAs being violated by host states to ensure compliance with international human rights law, general principles such as international human rights law will be applied directly to an investment, or to the conduct of the foreign investor, thereby meeting the requirements of Article 25 ICSID Convention.

In addition to the jurisdictional requirement in Article 25 ICSID Convention, in accordance with Article 46 ICSID Convention, an ICSID tribunal’s jurisdiction over counterclaims must arise ‘directly out of the subject-matter of the dispute’. Rather than focusing on the relationship between the counterclaim and the investment, this provision requires a direct relationship between the counterclaim and the object of the dispute.¹¹⁸ Based on the term ‘subject-matter’, the nexus required between the counterclaim and the originating claim would appear to be factual in nature.¹¹⁹ This view is supported by the ‘Notes to the ICSID Arbitral Rules’.¹²⁰

Despite this, the *Saluka v Czech Republic* award considered that a ‘close connexion’ between a counterclaim and the originating claim should be a common *legal* foundation.¹²¹ Rather than focusing specifically on the ICSID Arbitral Rules, this UNCITRAL tribunal attempted to determine the rules that ‘customarily govern the relationship between a counterclaim and the primary claim to which it is a response’.¹²² In reaching its decision, this award reviewed the UNCITRAL Rules,

¹¹⁸ *Antoine Goetz and others v. Republic of Burundi [II]* (n 90) [283].

¹¹⁹ Lalive and Halonen (n 76) 144.

¹²⁰ Notes to the ICSID Arbitration Rules (1968) Note B (a) to Rule 40, reprinted in ICSID Reports 63, 100. See Douglas, *The International Law of Investment Claims* (n 75) 261; Lalive and Halonen (n 76) fn 13 and 154; *Antoine Goetz and others v. Republic of Burundi [II]* (n 90) [283] – [285].

¹²¹ Lalive and Halonen (n 76) 154.

¹²² *Saluka Investment B.V. v. Czech Republic* (n 86) [61].

the ICSID Arbitral Rules and the provisions establishing the US-Iran Claims Tribunal. Consequently, the award has potential implications for counterclaims governed by the ICSID Arbitral Rules.

In determining what amounted to a close connection, the *Saluka* tribunal discussed the ICSID award *Klöckner v Cameroon*.¹²³ In *Klöckner*, the legal relationship between the parties was established by a series of contracts. When reviewing the relationship between the contracts to determine the nexus between the originating claim and the counterclaim, the tribunal referred to the contractual relationships as ‘an indivisible whole’ and ‘interdependent’.¹²⁴ When relying on *Klöckner*, the *Saluka* tribunal emphasised the indivisibility of the legal sources and determined that counterclaims must arise from the same legal source as the originating claim.¹²⁵

The *Saluka* tribunal supported this stance by reference to the common legal basis of originating claims and counterclaims in the US-Iran Claims tribunal jurisprudence.¹²⁶ However, jurisdiction over counterclaims in the US-Iran Claims Tribunal is limited to ‘any counterclaim that arises out of the same contract, transaction or occurrence that constitutes the same subject matter of [the] national’s claims’.¹²⁷ Therefore, the *Saluka* tribunal sought to establish a general principle based on specific instances where the facts gave rise to, or the jurisdictional basis required, a common legal origin. These factors do not relate the specific language used in Article 46 ICSID Convention.

The requirement created by *Saluka* would be very difficult to establish in practice in investment disputes given the asymmetrical nature of IIAs. The need to demonstrate a common legal origin for the counterclaim and the originating claim is likely to exclude the operation of counterclaims in investment disputes over IIAs

¹²³ *Klöckner Industrie-Anlagen GmbH et al v. Cameroon* ICSID Case No. ARB/81/2, Award, 21 October 1983.

¹²⁴ *Ibid* [17], [85].

¹²⁵ *Saluka Investment B.V. v. Czech Republic* (n 86) [79].

¹²⁶ *Ibid* [68] – [74].

¹²⁷ Iran-United States Claims Tribunal Claims Settlement Declaration (19 January 1981) 20 ILM 223 Article II(I).

entirely, as foreign investors are not under any legal obligations in the IIA.¹²⁸ This is contrary to the intentions behind the introduction of Article 46 ICSID Convention.

The *Saluka* tribunal continued its analysis by rejecting counterclaims that were based on obligations sourced from ‘general obligations’ found in the municipal law of the host state.¹²⁹ The basis for this conclusion was the *Amco v Indonesia* award which establishes the proposition that, for the purposes of Article 25 ICSID Convention:

[I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.¹³⁰

Yet, the *Saluka* award did not fully consider the *Amco* decision. The *Amco* award permits investment disputes based on general law to fall within ICSID’s jurisdiction if it ‘generates an investment dispute under the Convention’.¹³¹

Given the deficiencies in the approach taken by the *Saluka* tribunal, and the specific terms of Article 46 ICSID Convention, it is submitted that a factual basis, rather than a legal connection is required to establish that the counterclaim arises ‘directly out of the subject-matter of the dispute’. Further, provided that counterclaims meet this requirement, they can be based on general obligations that specifically impact upon an investment.

Based on this analysis, a counterclaim based on international human rights law can arise ‘directly out of the subject-matter of the dispute’. When a host state violates an IIA to comply with its international human rights law obligations, a foreign investor will bring a claim in ICSID arbitration against the host state. The subject matter of the dispute will be comprised of the foreign investor’s violations of international human rights law and the host state’s violations of the IIA in response.

¹²⁸ Douglas, *The International Law of Investment Claims* (n 75) 260; Lalive and Halonen (n 76) 154.

¹²⁹ *Saluka Investment B.V. v. Czech Republic* (n 86) [75].

¹³⁰ *Amco Asia Corporation and others v. Republic of Indonesia* (n 78) 565.

¹³¹ *Ibid.* See Douglas, *The International Law of Investment Claims* (n 75) 262.

As these considerations form the factual matrix of the dispute, it is likely that there will be a sufficient nexus to allow the host state to commence a counterclaim based on obligations sourced in international human rights law. As international human rights law has been applied specifically to the investment, the general nature of the obligations will not preclude ICSID's jurisdiction.

In conclusion, the jurisdictional requirements set out in Article 25 ICSID Convention can extend to international human rights law in specific circumstances. In relation to the phrase 'directly out of the subject-matter of the dispute' found in Article 46 ICSID Convention, a factual nexus is implied. The legal nexus advocated by the *Saluka* tribunal undermines the potential use of a host state human rights defence. However, the justifications provided in the tribunal's reasoning are flawed given that they do not fully take into account the terms of the ICSID Convention. Consequently, it is posited that if a sufficient factual nexus can be established between the claims made by the foreign investor and the alleged international human rights violations claimed by the host state to justify its conduct, the jurisdiction of an ICSID tribunal encompasses a counterclaim based on international human rights law.

5.3.2.3 Sourcing International Human Rights Law Obligations that Bind Foreign Investors

For a host state to utilise counterclaim procedures, foreign investors must owe legal obligations to the host state.¹³² For the purposes of a host state human rights defence, the obligations will need to be sourced from the international human rights law regime. This is due to the lack of references to international human rights law in the instruments giving rise to a foreign investor's obligations in international investment law. The ability of the foreign investor to owe obligations to the host state in the international arena is limited by the extent to which they possess international legal personality.

As set out in Chapter 2, this thesis adopts a positivist stance, which affects the manner in which international legal personality is established.¹³³ Given its focus

¹³² Kryvoi (n 67) 234.

¹³³ In adopting this approach, this thesis does not seek to undermine those that argue that non-state actors (and in particular, corporate entities) might possess international legal personality on other bases. See for example, M Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999); C Jochnick, 'Confronting the Impunity

on consent, positivism requires that states confer international legal personality upon non-state actors, including foreign investors. They may do this expressly, such as through treaty terms, or act in a manner that implies that international legal personality is conferred upon non-state actors.¹³⁴ If a state fails to confer international legal personality on a non-state actor, the non-state actor cannot possess rights or obligations in public international law. Hence, it is necessary to determine whether state consent, or conduct indicating consent, has been conferred upon foreign investors so that they owe obligations sourced in international human rights law to host states.

In light of these issues, this section outlines examples of how international human rights law obligations from a variety of sources may bind foreign investors and thereby form the basis of a host state human rights defence.

5.3.2.3.1 *Treaty Law*

One of the principal sources of international human rights law is treaty law.¹³⁵ Key international human rights law obligations are found in both international and regional treaties.¹³⁶ Although treaties such as the ICCPR and ICESCR refer in their preambles to individuals ‘having duties to other individuals’, international human rights law treaties direct their *legal* obligations to the state parties. For example, Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any

of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 Human Rights Quarterly 56; SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal 443; S Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where From Here?' (2003) 19 Connecticut Journal of International Law 1; S Udwadia, 'Corporate Responsibility for International Human Rights Violations' (2004) 13 Southern California Interdisciplinary Law Journal 359; I Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal 309; O De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006); R Mares, *The Dynamics of Corporate Social Responsibility* (Martinus Nijhoff Publishers 2008); R McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 Journal of Business Ethics 385; A McBeth, *International Economic Actors and Human Rights* (Routledge 2010); S Deva, *Regulating Corporate Human Rights Violations* (Routledge 2012).

¹³⁴ In the context of international human rights law, see JJ Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1993) 5 Harvard Human Rights Journal 51, 52.

¹³⁵ O De Schutter, *International Human Rights Law* (Cambridge University Press 2010) 17.

¹³⁶ Ibid 19 – 20.

kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹³⁷

This structure reflects the initial conception of human rights obligations as being a remedy against the abuse of power by the state.¹³⁸

The obligations imposed on states under international human rights law treaties are to respect, protect and fulfil the substantive rights set out in the treaty.¹³⁹ To comply with the duty to protect, states must take measures to ensure that activities conducted on their territory do not lead to human rights violations.¹⁴⁰ In particular, the United Nations Human Rights Committee has noted in relation to non-state actors in the context of Article 2(1) ICCPR:

[t]he article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its against, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.¹⁴¹

¹³⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹³⁸ PT Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77 International Affairs 31, 33; JA Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 Buffalo Human Rights Law Review 21, 271; C Tomuschat, *Human Rights Between Idealism and Realism* (Oxford University Press 2008) 97; M Hakimi, 'State Bystander Responsibility' (2010) 21 European Journal of International Law 341, 341; E De Brabandere, 'Non-State Actors and Human Rights : corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system' in J D'Asprement (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 271; A Gatto, *Multinational Enterprises and Human Rights* (Edward Elgar 2011) 64.

¹³⁹ F Mégret, 'Nature of Obligations' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights law* (Oxford University Press 2010), 130 – 132; De Schutter, *International Human Rights Law* (n 135) 242; see CESCR, 'General Comment no 15' on 'The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11 [23] (General Comment 15); OHCHR, 'Report of the High Commissioner for Human Rights - Human Rights, Trade and Investment' (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9 [28] – [30] (UNHCR 'Human Rights, Trade and Investment'); see also, for example, UNHRC, 'General Comment no 31' on 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [8].

¹⁴⁰ See OHCHR 'Human Rights, Trade and Investment' (n 139) [28] – [30]; see also, for example, General Comment no 15 (n 139) [23]; General Comment no 31(n 139) [8].

¹⁴¹ General Comment no 31 (n 139) [8]. This position is re-iterated in CESCR, 'General Comment no 12' on 'The Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5 [20] (General Comment 12) and in General Comment 14 CESCR, 'General Comment no 14' on 'The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 [64] (General Comment 14).

The conduct of non-state actors can be controlled in a variety of ways, but is primarily regulated by the domestic law of the state.¹⁴² Foreign investors, when entering the territory of the host state, submit to its jurisdiction and, as a result, are governed by its domestic law. Therefore, it is the duty of the foreign investor to comply with the host state's domestic law.¹⁴³ Consequently, unlike states that are *directly* bound by international human rights law, foreign investors are only *indirectly* bound through the translation of international human rights law into domestic obligations.¹⁴⁴ Thus, if a human rights violation is caused by a non-state actor, the conduct of the non-state actor is not attributed to the state.¹⁴⁵ Rather, it is the state's failure to protect that gives rise to its international responsibility.¹⁴⁶

In the case of international human rights law treaties, it is unlikely that a foreign investor will be directly bound by its terms as the prevailing structure found in the international human rights treaties considered in this thesis favours the imposition of indirect obligations on foreign investors.¹⁴⁷ In light of this structure, states have not expressly or implicitly conferred foreign investors with international

¹⁴² ICCPR (n 137) Article 2; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 Article 2 (ICESCR). See A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 93; R McCorquodale, 'Non-State Actors and International Human Rights Law' in S Joseph and A McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2009) 105; D Kinley, 'Corporate Social Responsibility' in R Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd edn, Wolters Kluwer 2011) 233.

¹⁴³ Muchlinski (n 138) 35; CM Vázquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43 *Colombia Journal of Transnational Law* 927, 936.

¹⁴⁴ Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where From Here?' (n 133) 20, 48; A Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 71; Vázquez (n 143) 930; Kinley (n 142) 236 – 237. See also General Comment no 14 [42]. A similar position is taken in the Convention on the Rights of the Child Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. See Articles 2(2) and 3(2), which refer to non-state actors, including the child's parents, legal guardians and family members, but places the obligation on the State Parties to ensure compliance with the obligation in question. This position is also confirmed in the decision of *Velasquez Rodriguez v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [172].

¹⁴⁵ McCorquodale, 'Non-State Actors and International Human Rights Law' (n 142) 107; Hakimi (n 138) 353.

¹⁴⁶ McCorquodale, 'Non-State Actors and International Human Rights Law' (n 142) 107; Hakimi (n 138) 353 – 354; M Pentikäinen, 'Changing International "Subjectivity" and Rights and Obligations under International Law - Status of Corporations' (2012) 8 *Utrecht Law Review* 145, 149.

¹⁴⁷ In general terms, '[v]ery few treaties in fact impose duties on non-state actors' (C Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in M Noortmann and C Ryngaert (eds), *Non-State Actor Dynamics in International Law* (Ashgate 2010) 77).

legal personality under international human rights law treaties.¹⁴⁸ As a result, it may be difficult for a host state to base the host state human rights defence on specific provisions drawn from these sources.

Although international human rights law treaties are inapplicable, international criminal law treaties have created binding obligations on individuals for serious violations of both international humanitarian law and international human rights law.¹⁴⁹ In the context of FDI, genocide and apartheid are two particularly pertinent examples. In *Piero Foresti*, discussed in Chapter 3, the impact of measures to counter apartheid were addressed. Claims relating to genocide have yet to be raised, however, the impact of investment projects on indigenous populations has the potential to give rise to such claims in the future, specifically in relation to investment projects that endanger the indigenous population's way of life.

The prohibition on genocide, sourced from both custom¹⁵⁰ and with its component elements set out various treaty obligations,¹⁵¹ has been criminalised by Article 4 of the Genocide Convention,¹⁵² which provides:

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Similarly, the human rights prohibition on racial discrimination¹⁵³ corresponds with criminal responsibility for individuals set out in Article 3 of the 1973 Apartheid

¹⁴⁸ J d'Asprement, 'Non-state actors from the perspective of legal positivism: The communitarian semantics for the secondary rules of international law' in J d'Asprement (ed), *Participants in the International Legal System* (Routledge 2011) 25. See Paust (n 134).

¹⁴⁹ See, for example, S Joseph and J Kyriakakis, 'The United Nations and Human Rights' in S Joseph and A McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2009) 34; R Cryer, 'International Criminal Law' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010); F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577, 578.

¹⁵⁰ This is primarily sourced from UNGA Res 96(1) (11 December 1946) UN Doc A/236. See NHB Jorgensen, *The Responsibility of States for International Crimes* (Oxford University Press 2000) 32 – 35; R Hansen, 'The International Legal Personality of Multinational Enterprises: Treaty, Custom and the Governance Gap' (2010) 10 *Global Jurist* 1 55- 56.

¹⁵¹ These include the right to life (ICCPR (n 137) Article 2), the prohibition on torture, cruel, inhuman or degrading treatment (ICCPR (n 137) Article 7) and the protection of minorities (ICCPR (n 137) Article 27).

¹⁵² Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

¹⁵³ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Article 2(d).

Convention.¹⁵⁴ As violations of some international human rights law violations simultaneously give rise to individual responsibility under international criminal law, it may be possible for host states to argue that foreign investors owe obligations to host states under international criminal law provisions for corresponding international human rights law violations.¹⁵⁵ This is feasible as in these instances host states have conferred international legal responsibility, which allows individuals to be prosecuted for international crimes.

An initial difficulty with this proposal is that international criminal law usually only applies to natural persons rather than corporate bodies.¹⁵⁶ For example, the permanent International Criminal Court (ICC) only has jurisdiction to prosecute natural persons.¹⁵⁷ This is sufficient for individual investors. However, as many foreign investors utilise a corporate form, for the purposes of a host state human rights defence, individual liability in international criminal law will need to be extended to encompass corporate bodies. This may be achieved in two ways.

The first is by recognising the criminal liability of corporate bodies. For example, in the *I.G. Farben*¹⁵⁸ decision, the Nuremburg tribunal did not have jurisdiction over the corporate entities and could not find that they were criminal organisations.¹⁵⁹ However, the corporations were imputed with criminal intentions based on the guilt of the individuals directing the act of the companies.¹⁶⁰ This imputation prevented corporate bodies from being used to avoid criminal liability in

¹⁵⁴ International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.

¹⁵⁵ McBeth (n 133) 315, 316.

¹⁵⁶ A Clapham, 'Non-State Actors' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010) 572. See also L Van den Herik and J Letnar Cernic, 'Regulating Corporations under International Law' (2010) 8 *Journal of International Criminal Justice* 725, 726.

¹⁵⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 Article 25(1). Legal entities cannot be indicted but directors, agents and employees of companies can be held accountable (see C de Than and E Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell 2003) 330).

¹⁵⁸ *The United States of America v. Carl Krauch, et al.* (1948) 15 ILR 668. See F Jessberger, 'On the Origins of Individual Criminal Responsibility Under International Law for Business Activity: IG Farben on trial' (2010) 8 *Journal of International Criminal Justice* 783.

¹⁵⁹ *The United States of America v. Carl Krauch, et al.* 678. 'It is appropriate to mention here that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings.'

¹⁶⁰ *Ibid.* '[C]orporations act through individuals and, under the perception of personal individual guilt...the Prosecution...must establish...beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorised or approved it. See D Stoitchkova, *Towards Corporate Liability In International Criminal Law* (Intersentia 2010) Chapter 3, Section III.3.

international law.¹⁶¹ By adopting a similar approach in light of the growing movement for corporate criminal liability in the form of corporate manslaughter,¹⁶² the potential remains for the generation of corporate criminal responsibility.¹⁶³ Nonetheless, when establishing the jurisdiction of the ICC, states rejected the possibility of jurisdiction over corporate bodies due to the lack of consistent state practice in this field.¹⁶⁴ Yet, this position was taken in relation to the jurisdiction of the ICC, rather than in relation to corporate criminal liability more generally in public international law.¹⁶⁵

Alternatively, the corporate veil could be pierced to confer liability on the individuals behind the corporate entity. The ICJ in *Barcelona Traction* rejected this position in the context of diplomatic protection, on the basis that the company was a separate entity to its shareholders for the purposes of determining its nationality.¹⁶⁶ However, the possibility of piercing the corporate veil in other situations was left available, specifically when it is required to achieve justice in the case.¹⁶⁷ Piercing the corporate veil in ICSID arbitration has primarily been argued as a means of determining the nationality of the foreign investor to identify whether the foreign investor is protected by a specific IIA.¹⁶⁸ In this context, the principle has been considered in order to prevent corporate structures being used as a means of avoiding liability.¹⁶⁹ The use of the principle in this way seeks to prevent injustice. Despite the limited use of this principle in both ICSID arbitration and public international law more generally, piercing the corporate veil in instances where individuals have used a corporate structure to avoid liability could amount to a general principle of

¹⁶¹ *The United States of America v. Carl Krauch, et al.*. ‘[O]ne may not utilise the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids or abets.’

¹⁶² Corporate criminal provisions exist in various forms in domestic jurisdictions including Australia, the United Kingdom, the United States of America, Brazil, Germany and Portugal. See M Pieth and R Ivory (eds), *Corporate Criminal Liability* (Springer 2011).

¹⁶³ This already exists in instruments addressing topics outside of the scope of international human rights law, for example, the Global Convention on the Control of Transboundary Movements of Hazardous Wastes (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 126, Articles 4(3) and 9(5).

¹⁶⁴ WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 425 - 426.

¹⁶⁵ Hansen (n 150) 45 – 46; De Brabandere (n 138) 279.

¹⁶⁶ *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3.

¹⁶⁷ *Ibid* [58]. See also separate opinion of Judge Jessup [17] who favoured piercing the corporate veil.

¹⁶⁸ See *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* ICSID Case No. ARB/03/16, Award, 2 October 2006 [358]; *Tokios Tokelès v. Ukraine* ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 [21] – [22], [30] – [38].

¹⁶⁹ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* [358].

international law based on the general acceptance of this procedure to achieve justice in domestic legal systems.¹⁷⁰ Given the seriousness of large scale or persistent breaches of international human rights law that simultaneously give rise to criminal liability in international law, it is arguable that if such an approach were a general principle of international law, this type of conduct would justify piercing the corporate veil in most jurisdictions.¹⁷¹

Should it be possible to bind the corporate foreign investor, or proceed against the individuals running the corporate body, it is posited that a host state human rights defence remains feasible against corporate foreign investors. By way of illustration, a corporate foreign investor persistently breaches international human rights law. The breaches amount to crimes in domestic law (either in relation to the individuals or the corporate body, depending on whether jurisdiction has corporate criminal liability). The host state has utilised its domestic law provisions to try and prevent further breaches, but the foreign investor persists despite the domestic law sanctions. The host state needs to stop the foreign investor from continuing to act in this manner. As the ICC does not have jurisdiction to hear the case regarding the international crimes being committed as corporate investors are not natural persons, the only means available to the host state is to evict the foreign investor and to breach the IIA. This action could then be justified by reference to the host state acting in accordance with international human rights law. The obligation owed to the host state by the foreign investor under international human rights law is governed by international criminal law (addressing the same conduct) thereby giving rise to the ability of the host state to present a counterclaim. The systemic nature of public international law permits the use of principles from different regimes and the use of these provisions fall within the remit of the ICSID Arbitral Rules based on the host state human rights defence proposed in this thesis.

In summary, at present, such an approach could be applied to foreign investors acting in the capacity of natural persons, rather than through corporate structures. Should the corporate veil also be pierced, or criminal liability be

¹⁷⁰ See S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 130.

¹⁷¹ See McBeth (n 133) 275.

attributed to corporations, the application of the defence can be extended to corporate investors.

5.3.2.3.2 Customary International Law

International human rights law can also be sourced from customary international law, but the precise manner in which this can be achieved is not clear.¹⁷² This is because the formation of custom requires both consistent state practice, evidencing state compliance with the obligation, and *opinio juris*, demonstrating a psychological intention of the state to be bound by the obligation.¹⁷³ Most state practice in relation to human rights principles evidences their violation by states, detracting from the requirement of consistent state compliance.¹⁷⁴ Given this difficulty, various suggestions have been made to modify how custom operates to give rise to customary international human rights standards.¹⁷⁵ However, to ensure the credibility of the host state human rights defence, it is submitted that both of the elements

¹⁷² De Schutter, *International Human Rights Law* (n 135) 52.

¹⁷³ See, for example, *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3, 41; *Nicaragua Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Merits) [1986] ICJ Rep 14, 108 - 109; B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1989) 12 *Australian Yearbook of International Law* 82, 88; JJ Paust, 'The Complex Nature, Sources and Evidence of Customary Human Rights' (1995/1996) 25 *Georgia Journal of International and Comparative Law* 147, 148. However, how to identify each element, and the subsequent evidential weight to be given to each element has also been debated. See A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 66; M Akehurst, 'Custom as a Source of International Law' (1975) 47 *British Yearbook of International Law* 1; F Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146; N Rodley, 'Human Rights and Humanitarian Intervention: the Case Law of the World Court' (1989) 38 *International and Comparative Law Quarterly* 321; O Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 *International and Comparative Law Quarterly* 501; H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/1996) 25 *Georgia Journal of International and Comparative Law* 287; J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85; A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757; R Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands International Law Review* 119; J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *European Journal of International Law* 523; AT Guzman, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 115, 151- 153; C Ochoa, 'The Individual and Customary International Law Formation' (2007) 48 *Virginia Journal of International Law* 119.

¹⁷⁴ See E Stubbins Bates, 'From Assertion to Solid Methodology in Customary International Human Rights Law' (2009) 103 *Proceedings of the Annual Meeting* (American Society of International Law) 492, 493; C Chinkin, 'Sources' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010) 112.

¹⁷⁵ See, for example Kirgis (n 173); T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 93; IR Gunning, 'Modernizing Customary International Law: the Challenge of Human Rights' (1991) 31 *Virginia Journal of International Law* 211, 215; Tomuschat (n 138) 34; Stubbins Bates (n 174) 493.

required to form customary international law should be established.¹⁷⁶ Therefore, accepted principles of customary international human rights law, where both these elements have been satisfied, will be examined to determine if they confer foreign investors with international legal personality.

A number of provisions of the Universal Declaration of Human Rights of 1948 (UDHR) are widely considered to provide a clear basis for customary international human rights law obligations.¹⁷⁷ Whilst this is a non-binding instrument, its content forms the basis of most treaty based human rights obligations.¹⁷⁸ Even if these principles may not have amounted to customary international law at the time the ICCPR and the ICESCR were drafted,¹⁷⁹ the widespread ratification and entry into force of these treaties would indicate that states deem themselves legally bound by the principles contained within these treaties, whose genesis was the UDHR.¹⁸⁰

The ICJ has declared principles from the UDHR to be customary in nature.¹⁸¹ Although the ICJ rejected the overall claim in the *South West Africa* cases, which drew heavily on the UDHR, Judge Tanaka's dissenting opinion clarified the role of the UDHR in the formation of customary international law by stating that it 'constitute[s] evidence of the interpretation and application of the relevant Charter provisions'.¹⁸² The ability of the UDHR to form custom was set out in Vice-President Ammoun's Separate Opinion in *Namibia (South West Africa)* where he

¹⁷⁶ Alternative approaches may rely on 'suspect' naturalist thinking (M Koskeniemi, 'The Pull of the Mainstream' (1990) 88 Michigan Law Review 1946, 1947) or result in biased decisions regarding the rights that reach customary international law status (Simm and Alston (n 173) 94 – 95).

¹⁷⁷ L Sohn, 'The Human Rights Law of the Charter' (1977) 12 Texas International Law Journal 129 133; AJ Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 International and Comparative Law Quarterly 537, 542; Hannum (n 173) 322 – 325; J Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 23.

¹⁷⁸ D Shelton, 'Commentary and Conclusions' in D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 449; McBeth (n 133) 18.

¹⁷⁹ See AM Weisburd, 'The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights' (1995/1996) 25 Georgia Journal of International and Comparative Law 99, 113 who denies the ICCPR a customary basis in 1966 due the lack of an enforcement mechanism for the rights set out within the instrument.

¹⁸⁰ Restatement (Third) of Foreign Relations Law (1987) Section 701 n2.

¹⁸¹ See Rodley (n 173).

¹⁸² *South West Africa Cases* (Judgment) [1966] ICJ Rep 6, 293. See Hannum (n 173) 336.

identified that the right to equality was a binding customary norm.¹⁸³ Further, in the *Tehran Hostages* decision, the ICJ inferred the binding nature of principles drawn from the UDHR when it stated that:

Wrongfully to deprive human beings of their freedom and to subject them to physical restraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enumerated in the Universal Declaration of Human Rights.¹⁸⁴

Whilst the formation of customary international law under the UDHR is a necessary pre-requisite for a host state human rights defence that is based on customary international human rights law, it is also a requirement that obligations be imposed upon foreign investors.

The application of binding obligations of customary international human rights law on non-state actors is often premised on the opening paragraph of the UDHR.¹⁸⁵ This refers to the role of ‘every individual and every organ of society’ in promoting respect for human rights to ensure their ‘universal and effective recognition and observance’. However, the significance of this terminology is unclear as the obligations set out in its operative paragraphs are clearly directed at states.¹⁸⁶ Further, Article 29(1) has been suggested as forming the basis for the UDHR’s universally binding nature.¹⁸⁷ It refers to everyone having ‘duties to the community in which alone the free and full development of his personality is possible’. Yet, despite the reference to the role of individuals, much like the preamble of the ICCPR and ICESCR, Article 29(1) UDHR fails to set out specific obligations for non-state actors.¹⁸⁸ These provisions do not clearly establish that the customary obligations contained in the UDHR are binding on individuals such as foreign investors. This position is supported by a lack of agreement between states on this point. Various interpretations of these terms are evidenced in the *travaux*

¹⁸³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* (Advisory Opinion) [1971] ICJ Reports 16, 76.

¹⁸⁴ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 42.

¹⁸⁵ Paust, ‘The Other Side of Right: Private Duties under Human Rights Law’ (n 134) 53; Vázquez (n 143) 942; JA Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006) 77; McBeth (n 133) 60.

¹⁸⁶ Hessbruegge (n 138) 35.

¹⁸⁷ Zerk (n 185) 77; McBeth (n 133) 60.

¹⁸⁸ Hessbruegge (n 138) 35.

preparatoires to the UDHR, which have not been reconciled by subsequent practice.¹⁸⁹ Consequently, although some substantive principles of the UDHR can be considered to be obligations sourced from customary international law, they only bind states.

This position is unlikely to differ in relation other instruments that may give rise to customary international human rights law. The UDHR has formed the foundation of most international human rights law documents.¹⁹⁰ International human rights law treaties, as discussed above, only indirectly bind foreign investors. State practice is yet to consistently evidence direct responsibility for human rights violations being conferred upon non-state actors.¹⁹¹ Without state consent, non-state actors, including foreign investors, are not conferred with international legal personality, and hence, cannot be held to be responsible in the international arena. Therefore, it does not appear that international human rights law obligations sourced from customary international law are capable of forming the binding obligation on foreign investors that is required to establish a host state human rights defence.

Despite this conclusion, similarly to international human rights law treaties, should a principle of customary international human rights law have a corresponding obligation in international criminal law, this would establish a binding obligation on a foreign investor.

5.3.2.3.3 Jus Cogens

International human rights law can also be sourced from principles deemed to be *jus cogens* in nature.¹⁹² *Jus cogens* are peremptory norms, and as such, are deemed to take priority over other conflicting norms in public international law.¹⁹³ Given their perceived supremacy, they may give rise to binding obligations on foreign investors. However, they also need to align with a positivist approach to public international

¹⁸⁹ Ibid.

¹⁹⁰ Hannum (n 173) 289; McCorquodale, 'Non-State Actors and International Human Rights Law' (n 142) 109.

¹⁹¹ D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Vanderbilt Journal of International Law 931, 934, 937;

¹⁹² De Schutter, *International Human Rights Law* (n 135) 65.

¹⁹³ D Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law?' (2009) 78 Nordic Journal of International Law 133, 135; De Schutter, *International Human Rights Law* (n 135) 65; McBeth (n 133) 20.

law. This requires evidence that states have consented to these principles possessing their peremptory status.

Articles 53 and 64 of the VCLT provide that *jus cogens* obligations prevail over inconsistent treaty obligations. Thus, these articles clearly evidence state consent to the increased standing of *jus cogens* obligations given their treaty basis and can be established by reference to positivist theory.¹⁹⁴ Still, the increased standing of *jus cogens* obligations outside of the scope of the VCLT undermines their positivist foundation.

Outside the remit of the VCLT, *jus cogens* obligations override all contrary international and domestic law regardless of state consent or persistent objector status.¹⁹⁵ Their application in this manner directly contradicts a positivist conception of public international law. As a result, *jus cogens* have been described as displaying 'enhanced normativity'.¹⁹⁶ The exact foundation for *jus cogens* operating in this way is unclear, and has been variably sourced from natural law, necessity, international public order, and the development of constitutional principles.¹⁹⁷ For example, *jus cogens* obligations have been referred to as consisting of general principles or morality common to all civilised states¹⁹⁸ that are necessary for a state to retain its status as a state.¹⁹⁹

Despite attempts to justify the conception of *jus cogens* norms, the lack of state consent undermines their legitimacy within positivist theory.²⁰⁰ As states have not conferred *jus cogens* norms with this higher status, positivism does not deem them to be bound by their enhanced characteristics.²⁰¹ Further, given the peremptory

¹⁹⁴ See A Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491, 492 – 493.

¹⁹⁵ D Shelton, 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law* 291, 305; Dubois (n 193) 137.

¹⁹⁶ P Weil, 'Towards Relative Normativity in International Law' (1983) 77 *The American Journal of International Law* 413, 423 – 424.

¹⁹⁷ Shelton, 'Normative Hierarchy in International Law' (n 195); Bianchi (n 194) 505. Different attitudes towards the status of *jus cogens* norms are identified in H Ruiz Fabri, 'Enhancing the Rhetoric of Jus Cogens' (2012) 23 *European Journal of International Law* 1049, 1052 – 1053.

¹⁹⁸ A Verdross, 'Forbidden Treaties in International Law' (1937) 31 *The American Journal of International Law* 571, 572; Shelton, 'Normative Hierarchy in International Law' (n 195) 298; see Dubois (n 193) 153 – 166.

¹⁹⁹ Verdross (n 198) 574.

²⁰⁰ Dubois (n 193) 134, 138.

²⁰¹ E Criddle and E Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *The Yale Journal of International Law* 331, 339.

nature of *jus cogens* norms, states are unable to avoid their application, minimising the role of state consent. As such, the role of *jus cogens* in public international law is unclear:

The theory of *jus cogens* or peremptory norms posits the existence of rules of international law that admit of no derogation and that can be amended only by a new general norm of international law of the same value. It is a concept that lacks both an agreed content and consensus in state practice. In most instances it is also an unnecessary concept because ... the derogating act violates treaty or custom and thus contravenes international law without the need to label the norm peremptory.²⁰²

The lack of a clear foundation for *jus cogens* norms in a positivist conception of public international law (apart from under the VCLT) undermines their utility as a source of obligations that bind foreign investors. On this basis, they will not be discussed in further detail for this purpose.

5.3.2.3.4 *Soft Law*

A further source of potential obligations in international law is soft law. Soft law is playing an increasing role in addressing the scope of human rights obligations of foreign investors, most specifically those utilising a corporate form.²⁰³ The term ‘soft law’, as used in this thesis, refers to principles of law that are not legally binding due to a lack of recognition as a formal source of law,²⁰⁴ usually due to a lack of state consent.²⁰⁵ Although not legally binding, ‘soft law’ may influence the development of binding legal standards and consequently, may be indicative of future legal standards.²⁰⁶ On this basis, soft law will be examined to determine if binding legal standards might form a basis for a host state human rights defence in the near future.

²⁰² Shelton, 'Normative Hierarchy in International Law' (n 195) 297 [footnote omitted]; see also Weil (n 196) 425; C Focarelli, 'Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects' (2008) 77 *Nordic Journal of International Law* 429, 444.

²⁰³ Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (n 191) 952.

²⁰⁴ J Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 *Leiden Journal of International Law* 313, 318 – 319. Positivism only recognises law and non-law (M Goldman, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 *Leiden Journal of International Law* 335, 341).

²⁰⁵ For a discussion on the role of state consent in the definition of soft law, see Ellis (n 204). For the distinction between the view of traditional and modern positivists with regards to the standing of soft law, see Goldman (n 204) 345.

²⁰⁶ Hessbruegge (n 138) 44; K Miles, 'Reconceptualising International Investment Law: Bringing the Public Interest into Private Business' in M Kolsky Lewis and S Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press 2010); Deva, *Regulating Corporate Human Rights Violations* (n 133) 76. As to how this might be achieved see C Chinkin, 'Normative

Current soft law initiatives²⁰⁷ that have the potential to, or actually address the human rights obligations of foreign investors, focus on the corporate social responsibility of multinational corporations. These tend to be voluntary initiatives such as the OECD Guidelines for Multinational Enterprises²⁰⁸ or the UN Global Compact,²⁰⁹ both of which encourage corporate bodies to act consistently with international human rights law.²¹⁰ These instruments do not attempt to generate any legal obligation on corporate bodies that may include foreign investors.²¹¹ Further, there is no indication that obligations of this type are likely to become legally binding on foreign investors in the near future as these initiatives stress that upholding human rights standards is primarily the responsibility of states.²¹² This is because prior attempts to initiate legally binding obligation for corporate bodies have been met with strong resistance from corporate bodies.

The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Norms) were drafted

Development in the International Legal System' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000); Gatto (n 138) 27 – 28.

²⁰⁷ For an overview of soft law initiatives, see Zerk (n 185) 244 – 262.

²⁰⁸ OECD, 'Guidelines for Multinational Enterprises' <<http://www.oecd.org/daf/inv/mne/>> accessed 21 August 2013. As to the nature of the OECD Guidelines for Multinational Enterprises, see J Karl, 'The OECD Guidelines for Multinational Enterprises' in M Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999); J Letnar Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 4 *Hanse Law Review* 71; DJ Johnston, 'Promoting Corporate Social Responsibility' in R Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd edn, Wolters Kluwer 2011).

²⁰⁹ United Nations, 'United Nations Global Compact' <<http://www.unglobalcompact.org>> accessed 21 August 2013. See H Correll, 'The Global Compact' in R Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd edn, Wolters Kluwer 2011).

²¹⁰ For example, the OECD, (accessed 21 August 2013) (n 208) encourage enterprises to 'contribute to economic, social and environmental progress with a view to achieving sustainable development' (Principle II.1) and 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments' (Principle II.2). The content of the standards to be adhered to is referenced to international law obligations contained in the Universal Declaration of Human Rights and 'other human rights obligations of the government concerned' (Commentary, page 40, para 4) This is to be achieved through paragraph II.2 which provides that corporations should 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.' Likewise, Principle 1 of United Nations, (accessed 21 August 2013) (n 209) states that 'businesses should support and respect and protection of internationally proclaimed human rights'. The content of the human rights standards referred to, are considered to be, at a minimum, the Universal Declaration of Human Rights and the core ILO Conventions (ibid). See Muchlinski (n 138) 37; Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (n 191) 949 – 952.

²¹¹ De Brabandere (n 138) 276.

²¹² OECD, (accessed 21 August 2013) (n 208) Commentary, page 39 para 4; United Nations, (accessed 21 August 2013) (n 209) Principle 1.

as a set of binding obligations that required corporate bodies to comply with international human rights law.²¹³ The legal foundation for the UN Norms was set out in its General Obligation in the following terms:

States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.²¹⁴

As the UN Norms were presented as being 'non-voluntary',²¹⁵ the business community did not accept these terms,²¹⁶ which, in turn, resulted in the abandonment of the UN Norms.²¹⁷

In response, the UN Secretary General appointed a Special Representative to clarify the roles and responsibilities of States, companies and other actors in the business and human rights sphere.²¹⁸ The UN Special Representative, Ruggie, has retreated from attempting to generate legally binding obligations for non-state actors in this sphere. Instead, he has established a framework whereby States have a duty to protect human rights and corporations have a responsibility to respect human rights.²¹⁹ The corporate responsibility is mainly to conduct due diligence in order to

²¹³ Human Rights Council, 'Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31 3 (Ruggie Report); D Weissbrodt and M Kruger, 'Human Rights Responsibilities of Non-State Actors' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005); Gatto (n 138) 81.

²¹⁴ Economic and Social Council, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (approved 13 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 General Obligations.

²¹⁵ Deva, *Regulating Corporate Human Rights Violations* (n 133) 104.

²¹⁶ Ruggie Report (n 213) 3; Deva, *Regulating Corporate Human Rights Violations* (n 133) 103.

²¹⁷ P Miretski and S-D Bachmann, 'UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': A Requiem' (2012) 17 *Deakin Law Review* 5, 9.

²¹⁸ Ruggie Report (n 213) 3; D Weissbrodt, 'UN Perspectives in 'Business and Humanitarian and Human Rights Obligations' (2006) 100 *ASIL Proceedings* 135, 137. See M Karlsson and M Granstrom, 'Business and Human Rights: The Recent Initiatives of the UN' in R Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd edn, Wolters Kluwers 2011)

²¹⁹ Ruggie Report (n 213) 6, 13.

avoid human rights violations.²²⁰ It is defined as a responsibility rather than an obligation under international human rights law²²¹ to encompass the idea that violations may not have legal consequences.²²²

The failure of the UN Norms to establish a legally binding regime for corporate human rights obligations, and the subsequent retreat from this approach in the Ruggie Framework, indicate that the creation of binding legal obligations will not be forthcoming in the short term, hindering a more widespread basis upon which host states can establish a host state human rights defence.

5.3.2.3.5 Domestic Law

As part of states' obligation to fulfil under international human rights law, they must enforce human rights at a domestic level.²²³ This is often achieved through the adoption of domestic laws that mirror international human rights law standards.²²⁴ As a result, domestic provisions reflect international human rights law found in treaties. Foreign investors are bound by the domestic law of the host state in which they invest.²²⁵ Therefore, given the similar content of domestic and international obligations, domestic law provisions may provide a source of international human rights law obligations that are binding on a foreign investor. Based on a positivist conception of public international law, this is the final option from which to source binding legal obligations.

The means by which international human rights law will be implemented into domestic law will depend on the constitution of the state in question.²²⁶ Customary international law is usually automatically binding.²²⁷ However, some state constitutions require that treaty based international law be incorporated into

²²⁰ Ibid Principle 15.

²²¹ Ibid Principles 11 – 15.

²²² Deva, *Regulating Corporate Human Rights Violations* (n 133) 106.

²²³ McBeth (n 133) 45.

²²⁴ W Kealin and JE Kunzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 83.

²²⁵ M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (Kluwer Law International 2010) 200; A Sheppard and A Crockett, 'Are Stabilization Clauses a Threat to Sustainable Development?' in M-C Cordonier Segger, MW Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 344. See, for example, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* ICSID Case No. ARB/01/7, Award, 25 May 2004 [98].

²²⁶ M Dixon, *Textbook on International Law* (Oxford University Press 2007) 95.

²²⁷ This is regardless of whether a monist or dualist conception of national and public international law is adopted by a state. See *ibid*, Chapter 4.

domestic law by virtue of legislation.²²⁸ Other jurisdictions automatically incorporate the terms of treaty based international law into domestic law without any further steps.²²⁹ In states that require the incorporation of international law, it may be difficult to clearly identify the obligation as being sourced from international human rights law. For example, the right to life may correspond to a prohibition on murder within a criminal law regime. Other rights may be implemented in other criminal or tortious provisions. Whether based on international human rights law sourced from customary international law or treaty law, the host state will need to identify and correlate the domestic legal provisions with the international obligation to show that it is sourced in international human rights law. Provided the link to international human rights law can be established, it is arguable that a general domestic provision that gives effect to an international human rights law obligation can form the basis of a host state human rights defence given its binding nature on the foreign investor.

5.3.2.3.6 Preliminary Conclusion

In summary, given the restrictive approach taken by positivism to the transfer of international legal personality to non-state actors, there are very few sources of international human rights law that directly bind foreign investors. This is particularly true of customary international law and principles deemed to be *jus cogens* in nature. Whilst international human rights law treaties cannot bind foreign investors independently, when combined with corresponding provisions in international criminal law treaties, a host state human rights defence becomes feasible. Individual investors can currently be bound by a host state human rights defence sourced from these instruments. Corporate investors can also be bound if general principles of international law permit the piercing of the corporate veil. International human rights law provisions that take a domestic form will also bind foreign investors. It does not appear that other sources of binding obligations will be forthcoming in the near future based on existing soft law provisions. Should a theoretical basis that is more conducive to establishing international legal personality be adopted, the scope of the host state human rights defence could be extended further.

²²⁸ This is a dualist approach. See *ibid.*

²²⁹ This is a monist approach. See *ibid.*

5.3.3 Preliminary Conclusion

Counterclaims provide an appropriate mechanism by which international human rights law can be introduced into ICSID arbitration in the form of a host state human rights defence. The attributes of counterclaims meet the criteria sought in a host state human rights defence. They are sourced in ICSID Arbitral Practice, conferring them with sufficient credibility. Additionally, they can achieve the aim of minimising dual liability for host states.

When applying counterclaims, host states should be able to meet all of the necessary elements set out in Article 46 ICSID Convention. Provided that party consent as set out in the applicable IIA covers ‘any’ or ‘all’ disputes, an ICSID arbitral tribunal should permit counterclaims. Some ICSID arbitral tribunals may permit counterclaims on the basis of the foreign investor commencing ICSID arbitration in accordance with the terms of the host states’ standing offer. However, this is not guaranteed, and although beneficial for a host state human rights defence, does not fit the positivist framework adopted in this thesis.

There should also be a sufficient nexus between international investment law and international human rights law to satisfy the dual subject matter jurisdiction elements set out in Article 46 ICSID Convention. Provided that the violations of international human rights law by the foreign investor are the cause of the host state’s breaches of the IIA, the requirements of Article 25 of the ICSID Convention will be met. Further, the factual connection that gives rise to the intersection of international human rights law and international investment law will meet the requirement that the counterclaim must ‘arise directly from the subject-matter of the dispute’. This is despite the ruling in *Saluka*, which was premised on incorrect assumptions regarding the status of the law.

Finally, international human rights law treaties (and potentially custom), in conjunction with international criminal law treaties, provide binding legal obligations on individual foreign investors. Additionally, domestic law manifestations of international human rights law also act as a source of law that can form the basis of a host state counterclaim grounded in international human rights law. The sources available are limited due to the positivist legal framework adopted in this thesis.

5.4 APPLICABLE LAW

Counterclaim procedures in ICSID arbitration are the most promising means of establishing the jurisdictional foundation on which to base a host state human rights defence.²³⁰ Although counterclaims permit a host state to refer to international human rights law that binds a foreign investor before an ICSID arbitral tribunal, the ICSID arbitral tribunal must be able to apply international human rights law²³¹ for a host state human rights defence to be implemented. Therefore, this section considers whether obligations sourced jointly from international human rights law and international criminal law, and international human rights law sourced from domestic law, form part of the applicable law of an ICSID arbitral tribunal in accordance with Article 42(1) ICSID Convention.

5.4.1 Identifying the Applicable Law in ICSID Arbitration

Applicable law is the substantive law that an ICSID arbitral tribunal refers to when determining the merits of the issues in dispute between the parties.²³² Article 42(1) ICSID Convention governs the process of determining the substantive law that applies in ICSID arbitration.²³³ It states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The first sentence of Article 42(1) ICSID Convention addresses the situation where the parties have agreed the applicable substantive rules of law. In contrast, the second sentence of Article 42(1) ICSID Convention provides the mechanism by which an ICSID arbitral tribunal is to determine the appropriate substantive law in the absence of a selection by the parties. The application of these two approaches will be examined in turn to identify the circumstances in which international human

²³⁰ See section 5.3.1 above.

²³¹ Lalive and Halonen (n 76) 150; Kryvoi (n 67) 219.

²³² T Begic, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005) 3; Y Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed), *Arbitration under International Investment Agreement: A Guide to Key Issues* (Oxford University Press 2010) 191.

²³³ Begic (n 232) 4 – 5; A Leeks, 'The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65 *University of Toronto Faculty of Law Review* 1, 10.

rights law that binds a foreign investor can potentially form part of the applicable law of an ICSID tribunal.

5.4.1.1 *Agreed Choice of Law*

The first sentence of Article 42(1) ICSID Convention draws upon the principle of party autonomy²³⁴ to permit the disputing parties to select the applicable law governing the dispute.²³⁵ The choice of applicable law can be sourced in a direct agreement between the parties,²³⁶ in domestic legislation,²³⁷ or in an IIA that offers consent to ICSID arbitration.²³⁸ Although stated as a choice of law, should the applicable law be sourced in the IIA, the foreign investor will not have selected the applicable law, as this instrument is negotiated by the host state and the home state of the foreign investor.²³⁹ However, by consenting to ICSID arbitration in the terms offered, the foreign investor is deemed to have consented to any choice of applicable law in the IIA.²⁴⁰ Hence, the applicable law clause set out in an IIA is considered to represent the choice of the disputing parties.

Determining the parties' choice of applicable law is a matter of interpreting the intentions of the parties.²⁴¹ Therefore, rather than analysing Article 42(1) ICSID Convention, it is necessary to interpret the terms used by the parties when expressing their choice of applicable law.²⁴² The parties should make the choice of applicable law clearly and unequivocally.²⁴³ Nonetheless, there is no requirement that the

²³⁴ A Maniruzzaman, 'International Commercial Arbitration: The Conflict of Laws Issues in Determining the Applicable Substantive Law in the Context of Investment Agreements' (1993) 40 *Netherlands International Law Review* 201, 233; A Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 182 – 183, 184; O Chukwumerije, 'International Law and Article 42 of the ICSID Convention' (1997) 14 *Journal of International Arbitration* 79, 83, 85; Schreuer, *The ICSID Convention: A Commentary* (n 113) 553, 558 – 559; RH Kriendler, 'The Law Applicable to International Investment Disputes' in N Horn (ed), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International 2004) 402; Begic (n 232) 5, 11, 13; Leeks (n 233) 10; Banifatemi (n 232) 191, 192; Y Kryvoi, *International Centre for Settlement of Investment Disputes* (Kluwer Law International 2010) 61.

²³⁵ Begic (n 232) 5.

²³⁶ Kryvoi, *International Centre for Settlement of Investment Disputes* (n 234) 61.

²³⁷ *Ibid.*

²³⁸ A Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties' (2001) 16 *ICSID Review - Foreign Investment Law Journal* 20, 21.

²³⁹ See *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka* ICSID Case No. ARB/87/3, Final Award, 27 June 1990 [19] – [20].

²⁴⁰ Banifatemi (n 232) 195; See *Antoine Goetz and others v. Republic of Burundi [III]* [94].

²⁴¹ Banifatemi (n 232) 199.

²⁴² *Ibid.*

²⁴³ *Ibid* 198.

parties make an express choice of law. Consequently, the parties may imply a choice of law.²⁴⁴ In making a determination regarding the applicable law when an implicit choice has been made, tribunals have referred to provisions set out in domestic legislation permitting ICSID arbitration,²⁴⁵ the terms of IIAs conferring ICSID with jurisdiction,²⁴⁶ and the submissions of the disputing parties²⁴⁷ to identify the applicable law that the parties are seeking to rely upon. When interpreting an implied choice of law, tribunals need to ensure that the surrounding circumstances support their conclusion.²⁴⁸ If no choice of law can be discerned, the tribunal may reach the conclusion that no choice of law has been made,²⁴⁹ invoking the second sentence of Article 42(1) ICSID Convention.²⁵⁰

When making their choice regarding the applicable law, the parties may select either domestic law or international law, both domestic and international law or may select particular ‘rules of law’ to govern selected aspects of their agreement.²⁵¹ They may also limit the applicable law to the IIA being interpreted.²⁵² As a result, there are a variety of means by which the international human rights law that binds a foreign investor could fall within the scope of an ICSID tribunal’s applicable law.²⁵³

First, the parties may make an express or implied choice of law that encompasses international human rights law. In doing so, any choice must also include international criminal law, as the ICSID arbitral tribunal will need to determine if the obligations relied on by the host state are binding on the foreign

²⁴⁴ Chukwumerije (n 234) 92; Begic (n 232) 57.

²⁴⁵ Schreuer, *The ICSID Convention: A Commentary* (n 113) 574 - 576. See, for example, *SPP v. Egypt* (Award) ICSID Case ARB/84/3 (20 May 1992) in 3 ICSID Reports 189.

²⁴⁶ Schreuer, *The ICSID Convention: A Commentary* (n 113) 581 – 583.

²⁴⁷ Ibid 577 – 581. See, for example, *Wena Hotels LTD. v. Arab Republic of Egypt* ICSID Case No. ARB/98/4, Award, 8 December 2000 [79].

²⁴⁸ Chukwumerije (n 234) 92 – 93.

²⁴⁹ Begic (n 232) 57.

²⁵⁰ Kryvoi, *International Centre for Settlement of Investment Disputes* (234) 61.

²⁵¹ Chukwumerije (n 234) 85; Begic (n 232) 5; Banifatemi (n 232) 196. The reference to ‘rules of law’ in Article 42(1) ICSID Convention reflects the ability of parties to only adopt aspects of a legal system, rather than the entirety of the rules, or to select rules that are not drawn from a national system of laws (Chukwumerije (n 234) 85; Schreuer, *The ICSID Convention: A Commentary* (n 113) 565; Kriendler (n 234) 408; Kryvoi, *International Centre for Settlement of Investment Disputes* (n 234) 61).

²⁵² Banifatemi (n 232) 197.

²⁵³ Y Radi, ‘Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox’ (2012) 37 North Carolina Journal of International Law and Commercial Regulation 1107, 1121 -1122.

investor. This is most likely to be achieved by a choice of international law in general terms, rather than by a specific reference to international human rights law and international criminal law. International law may be identified as the only form of applicable law,²⁵⁴ or it may be selected in conjunction with domestic law.²⁵⁵ International law in Article 42(1) ICSID Convention should be understood as referring to law that can be traced to those sources set out in Article 38(1) of the Statute of the ICJ.²⁵⁶ Whilst a reference to international law is likely to be interpreted as being restricted to principles of international investment law or those of treaty interpretation,²⁵⁷ the sources of international law that may be referred to are capable of including international human rights law and international criminal law. Thus, in theory, there is no reason to prevent international human rights law and international criminal law being referred to by an ICSID arbitral tribunal, especially if a counterclaim relying on these principles is before an ICSID arbitral tribunal.

The second means by which international human rights law may form part of the applicable law of the tribunal is through the selection of domestic law. In this instance, international human rights law obligations only need to be reflected in domestic law, as the binding obligation on the foreign investor is established through the foreign investor submitting to the host state's jurisdiction. Should a domestic legal regime be chosen as the applicable law, any principles of international human rights law that are incorporated into the domestic law of that state will fall within the scope of the applicable law.²⁵⁸ When selecting domestic rules, the parties do not need to refer to the domestic law of the host state (although the adoption of another state's laws is unlikely).²⁵⁹ Consequently, the content of the legal rules will need to be examined to determine whether obligations set out in international human rights law are reflected in the domestic laws selected.

If the state whose rules are selected is party to international human rights law obligations at a treaty level, it is likely that domestic rules will reflect at least some

²⁵⁴ Begic (n 232) 18.

²⁵⁵ Ibid 19.

²⁵⁶ ICSID, (accessed 15 July 2013) (n 70).

²⁵⁷ See, for example, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka* (n 239) [38], [39], [48] – [49] and [50]; *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia* ICSID Case No. ARB/99/2, Award, 25 June 2001 [366].

²⁵⁸ Schreuer, *The ICSID Convention: A Commentary* (n 113) 584; Kriendler (n 234) 413 – 414.

²⁵⁹ Kriendler (n 234) 404; Begic (n 232) 17.

of these obligations, as states party to international human rights law are obliged to implement these principles in domestic law as part of their obligation to enforce international human rights law.²⁶⁰ However, due to the differing ways in which legal systems give effect to, and prioritise international legal principles, this approach is not guaranteed to result in international human rights obligations being applied in the manner envisaged by the parties to the human rights treaty.²⁶¹ It will also be necessary for the host state to connect the domestic law with the international human rights law obligation to demonstrate that the domestic provision is an embodiment of the international rule. This may prove to be a difficult task. Therefore, this option may entail more risk for a host state should they seek to refer to applicable law sourced in domestic provisions when attempting to invoke the host state human rights defence. A direct reference to international law in the choice of law is preferable.

Finally, even if the parties have not expressly or implicitly chosen international human rights law (in either its international or domestic law forms) as their applicable law, it may still be able to be invoked in certain circumstances.²⁶² Principles drawn from public international law may be referred to by the ICSID arbitral tribunal, to give effect to the parties' choice of law, despite the parties not selecting international law as the applicable law. For example, the interpretation of IIAs may require reference to principles of treaty interpretation founded on public international law.²⁶³ It is unlikely that principles drawn from international human rights law will be required to serve this purpose in the absence of a host state human rights defence. Nevertheless, should a host state human rights defence be introduced into ICSID practice, it may be necessary for an ICSID arbitral tribunal to make reference to international human rights law (and potentially international criminal law) to give effect to the defence. Consequently, this supplementary means of referring to international law may justify the inclusion of international human rights law within the applicable law of an ICSID arbitral tribunal.

²⁶⁰ Kealin and Kunzli (n 224) 83.

²⁶¹ Schreuer, *The ICSID Convention: A Commentary* (n 113) 585; Kriendler (n 234) 414.

²⁶² Kryvoi, *International Centre for Settlement of Investment Disputes* (n 234) 62 – 63. There is continued debate regarding the extent to which this may occur. See Chukwumerije (n 234) 85 – 9. See *SPP v. Egypt* (n 245).

²⁶³ Leeks (n 233) 16. See *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic* ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 [63].

Thus, when the disputing parties have made either an express or implied choice to include international law within the applicable law of an ICSID tribunal, it is likely to include international human rights law. A choice of domestic law may also indirectly include principles drawn from international human rights law, although these may not be as easy to identify, or be applied by an ICSID arbitral tribunal in the same manner as their corresponding international obligations. As a result, domestic law embodiments of international human rights law are not as preferable as direct references to international law. Should a host state human rights defence be established, international human rights law may also be referred to by an ICSID arbitral tribunal in the absence of international law being chosen by the parties to ensure the defence is effective.

5.4.1.2 *Absence of Agreed Choice of Law*

The failure of the disputing parties to choose the applicable law does not prevent the host state from being able to invoke international human rights law to support a host state human rights defence. In the absence of an express or implied agreement by the parties on the substantive law that is to be applied to resolve the dispute, the second sentence of Article 42(1) of the ICSID Convention applies.²⁶⁴ This sentence is intended to provide certainty by ensuring that rules of substantive law can be applied to a dispute.²⁶⁵ The default position under this provision is that the law of the host state is to be applied (in conjunction with international law).²⁶⁶ This is because the law of the host state is most likely to be the law that has the closest connection to the investment that is the subject of the dispute.²⁶⁷ The law of the host state remains the default position, but is nonetheless subject to the operation of conflict of laws rules. Therefore, if another domestic legal system is more closely connected to the investment, that law is to be applied instead.²⁶⁸ This should be an ICSID tribunal's first step in determining the applicable law in the absence of an agreement between the parties.²⁶⁹ As a result, much like an agreed choice of law, domestic law may

²⁶⁴ Schreuer, *The ICSID Convention: A Commentary* (n 113) 597; Begic (n 232) 103, 105.

²⁶⁵ Schreuer, *The ICSID Convention: A Commentary* (n 113) 553; Begic (n 232) 5.

²⁶⁶ Schreuer, *The ICSID Convention: A Commentary* (n 113) 596.

²⁶⁷ Maniruzzaman (n 234) 233; Schreuer, *The ICSID Convention: A Commentary* (n 113) 599.

²⁶⁸ Chukwumerije (n 234) 95; Schreuer, *The ICSID Convention: A Commentary* (n 113) 606; Begic (n 232) 106.

²⁶⁹ Schreuer, *The ICSID Convention: A Commentary* (n 113) 606; Begic (n 232) 106.

permit a host state to correlate the domestic provision with an obligation sourced in international human rights law.

In addition the law of the host state (or the most appropriate law under the host state's conflict of laws rules) the applicable law also includes international law. This strengthens the ability of a host state to refer to international human rights law obligations in the absence of an agreed choice of law. For the purposes of Article 42(1) ICSID Convention, international law refers to those sources of law referred to in Article 38(1) Statute of the ICJ.²⁷⁰ ICSID practice has also extended this scope to consideration of prior decisions and soft law instruments such as UN General Assembly Resolutions.²⁷¹

However, the application of international law as the substantive law of ICSID arbitration is limited to instances in which it 'may be applicable'. When determining the circumstances in which international law is applicable, the conventional interpretation given to this provision is to limit the role of international law to fill lacuna in domestic law, or alternatively to correct the law should domestic law be in violation of principles of international law.²⁷² Consequently, to ensure that host state law (or the law to be applied under the host state's conflict of laws rules) is in compliance with international law, both legal systems should be applied to the dispute before the ICSID tribunal.²⁷³ Domestic law will be the primary source of law unless the principles relied upon are only located in international law, or domestic law principles are in violation of international law.²⁷⁴ In these instances, reference should be made to principles found in international law.²⁷⁵ Hence, the role of

²⁷⁰ ICSID, (accessed (n 70)).

²⁷¹ Schreuer, *The ICSID Convention: A Commentary* (n 113) 616 – 617, 618; Kryvoi, *International Centre for Settlement of Investment Disputes* (n 234) 66 – 67.

²⁷² Maniruzzaman (n 234) 234, 235; Chukwumerije (n 234) 98; Schreuer, *The ICSID Convention: A Commentary* (n 113) 623; E Gaillard and Y Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 *ICSID Review - Foreign Investment Law Journal* 375, 375; Begic (n 232) 155; A Giardina, 'International Investment Arbitration: Recent Developments as to the Applicable Law and Unilateral Recourse' (2006) 5 *The Law and Practice of International Courts and Tribunals* 29, 30; Leeks (n 233) 18; Banifatemi (n 232) 201-202; I Alvik, 'The Hybrid Nature of Investment Treaty Arbitration - Straddling the National/International Divide' in C Erikson and M Emberland (eds), *The New International Law - An Anthology* (Martinus Nijhoff Publishers 2010) 95; see, for example, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* ICSID Case No. ARB/01/6, Award, 7 October 2003 [10.1.2].

²⁷³ Schreuer, *The ICSID Convention: A Commentary* (n 113) 631; Begic (n 232) 106.

²⁷⁴ Schreuer, *The ICSID Convention: A Commentary* (n 113) 631; Leeks (n 233) 18.

²⁷⁵ Schreuer, *The ICSID Convention: A Commentary* (n 113) 631.

international law is more limited in the absence of agreement between the parties than when its use has been agreed.

It posited that, should this interpretation be adopted, the relationship between international law and domestic law would permit international human rights law (and international criminal law) to form part of the applicable law of the ICSID tribunal. Should the relevant provisions of international human rights law be found in the applicable domestic law, they will indirectly apply (albeit subject to potentially different interpretations). If there is a lacuna in the domestic law, in that the provisions cannot be sourced in national law, then international human rights law (and international criminal law) can be applied to fill this lacuna. Further, if any provisions in the domestic law are inconsistent with international human rights law, international law will prevail. Consequently, international human rights law can form part of the applicable law even when not expressly selected by the disputing parties. Therefore, should a host state human rights defence be introduced into ICSID arbitral practice, it would be supported by this approach to the second sentence of Article 42(1) ICSID Convention.

An alternative view regarding the manner in which the relationship between domestic and international should be approached is that both domestic law and international law should be applied with equal weight.²⁷⁶ This interpretation has been argued to focus on the use of ‘and’ between domestic law and international law in the second sentence of Article 42(1) ICSID Convention.²⁷⁷ This requires an ICSID tribunal to consider the issue in dispute and undertake a process of classifying it to determine whether domestic or international law should apply²⁷⁸ and utilising domestic law and international law in a complementary manner.²⁷⁹ Such an approach is supported by the decision in *Wena Hotels v Egypt (Annulment Decision)* where it was stated that:

²⁷⁶ See, for example, *Azurix Corp v. The Argentine Republic* ICSID Case No. ARB/01/12, Award, 14 July 2006 [66] – [67]; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* ICSID Case No. ARB/04/19, Award, 18 August 2008 [441]; *El Paso Energy International Company v. Argentine Republic* ICSID Case No. ARB/03/15, Award, 31 October 2011 [129].

²⁷⁷ Banifatemi (n 232) 202. See Gaillard and Banifatemi (n 272); c.f. Douglas, *The International Law of Investment Claims* (n 75) 129.

²⁷⁸ Gaillard and Banifatemi (n 272) 403 – 411; Banifatemi (n 232) 203; Douglas, *The International Law of Investment Claims* (n 75) 45 – 52.

²⁷⁹ Alvik (n 272) 96.

What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.²⁸⁰

This approach has been reflected in ICSID awards including *Santa Elena v Costa Rica*²⁸¹ and several awards considering the customary law of the state of necessity in light of Argentina's 2001/2002 financial crisis (discussed in Chapter 3). In the *CMS v Argentina* decision, the tribunal justified its approach in the following terms '[a] more pragmatic and less doctrinaire approach has emerged, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies'.²⁸²

Should both domestic law and international law apply simultaneously, this would also permit international human rights law to form part of the applicable law of an ICSID arbitral tribunal. This is due to the process of classifying the nature of the law before determining its appropriate source. The introduction of a host state human rights defence would require that host state arguments be classified as being governed by international law, which in turn, would enable the ICSID tribunal to refer to international human rights law as part of the applicable law to apply the defence.

The divergence in approaches to the relationship between domestic law and international law within the second sentence of Article 42(1) ICSID Convention remains contentious, with ICSID arbitral tribunals applying both approaches.²⁸³ Whilst a consistent approach in ICSID arbitration would be desirable, it is submitted that the purpose of the second sentence of Article 42(1) ICSID Convention is not to prescribe the manner in which international law and domestic law interrelate.²⁸⁴ Rather, this is a matter for ICSID tribunals to develop as part of their arbitral practice.²⁸⁵ As Broches recognised, the importance of Article 42(1) ICSID

²⁸⁰ *Wena Hotels LTD. v. Arab Republic of Egypt* ICSID Case No. ARB/98/4, Annulment Proceeding, 5 February 2002 [40].

²⁸¹ See Section 5.1 above.

²⁸² *CMS Gas Transmission Company v. Argentine Republic* ICSID Case No. ARB/01/8, Award, 12 May 2005 [116].

²⁸³ See footnotes 225 and 229 above.

²⁸⁴ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* [441].

²⁸⁵ Douglas, *The International Law of Investment Claims* (n 75) 129.

Convention is not in its prescriptive nature, but ‘lies in the fact that it opens the way for tribunals to pronounce themselves on these questions and thus to contribute to the further development of international law in this field’.²⁸⁶

Consequently, the extent to which international human rights law can be considered to fall within the applicable law of an ICSID tribunal in the absence of any agreement between the parties remains dependent on the tribunal’s interpretation of the second sentence of Article 42(1) ICSID Convention. In accordance with both interpretations, international law forms part of the applicable law. However, if a narrow interpretation is taken, international law may not be referred to unless domestic law fails to address the point raised, or international law is inconsistent with the domestic law in issue. In accordance with a wider interpretation, an ICSID arbitral tribunal could apply any law that is classified as being sourced from international law. In both instances, international human rights law could be introduced. However, the wider interpretation is more receptive to the direct application of international human rights law as compared to provisions that reflect its content in domestic law provisions, thereby benefitting the operation of a host state human rights defence.

5.4.1.3 *The Role of Secondary Rules - Systemic Integration*

Reference to international law does not only refer to substantive principles of public international law.²⁸⁷ It can also refer to secondary rules of public international law.²⁸⁸ Of particular relevance to the applicable law of an ICSID arbitral tribunal is the role that treaty interpretation may play by indirectly introducing international human rights law through the process of systemic integration.²⁸⁹

As outlined in Chapter 2, systemic integration relies on Article 31(3)(c) VCLT to require that, when interpreting a treaty, its relationship with other principles of public international law should be taken into account. A reference to international law in the applicable law of an ICSID arbitral tribunal includes Article 31(3)(c) VCLT. Hence, systemic integration could permit ICSID arbitral tribunals to

²⁸⁶ Broches (n 234) 184.

²⁸⁷ A van Aaken, 'Fragmentation of International Investment Law: The Case of International Investment Law' (2006) 17 Finnish Yearbook of International Law 91, 103.

²⁸⁸ Ibid.

²⁸⁹ Radi (n 253) 1124 – 1125.

refer to international human rights law when interpreting IIAs. Therefore, although not a direct means of establishing a host state human rights defence, systemic integration provides an additional means by which international human rights could form part of the applicable law of an ICSID arbitral tribunal when international law is selected by the parties, or applies by default. A full discussion of the potential role of systemic integration in achieving this aim is beyond the scope of this thesis. Nonetheless, should a host state human rights defence become fully functional, this may provide a further means of introducing international human rights law into the applicable law of an ICSID arbitral tribunal.

5.4.2 Preliminary Conclusion

International human rights law is capable of forming part of the applicable law as either international law or domestic legal provisions. The manner in which it arises will depend on the precise terms of the choice of applicable law clause and the circumstances in which the tribunal might seek to rely on it.

If the parties have expressly or impliedly agreed the applicable law, and have selected international law, given its broad scope, there is no reason to exclude international human rights law and international criminal law from its remit. If domestic law is selected, international human rights law will apply in its municipal form. A host state may need to identify the obligation in international human rights law and ensure that the principles align. Thus, an express reference to international law is preferable.

Should the parties fail to agree on the applicable law, international human rights law is still likely to apply. The manner in which it applies will depend on the interpretation given to the second sentence of Article 42(1) ICSID Convention. Should the traditional approach apply, the role of international law will be limited to correcting domestic law or filling lacunae. If a wider interpretation is given to the provision, international law will apply simultaneously with domestic law. Whilst the wider interpretation gives more scope for the introduction of international human rights law to be applied by the ICSID arbitral tribunal, both interpretations permit an ICSID arbitral tribunal to refer to international human rights law. Once a host state human rights defence is established, Article 42 ICSID Convention may be

supplemented by principles drawn from secondary rules such as systemic integration.

5.5 CONCLUSION

A substantive host state human rights defence is the most feasible form of host state human rights defence, despite being more complex to argue than a procedural defence. Current defences in ICSID arbitration are unable to achieve what is required from a host state human rights defence. However, counterclaim procedures in ICSID arbitration provide a clear foundation for a host state human rights defence. In doing so, they meet the desirable characteristics of a host state human rights defence identified in Chapter 3 which are that the defence should be established outside of the terms of the IIA, that it exists in ICSID arbitral practice, minimises the risk of dual liability for host states and that it can be augmented by *amicus curiae* procedures. Although counterclaims do not preclude the host state's liability, they act in such a way so as to permit a host state to seek compensation from the foreign investor for violations of international human rights law. This sum is balanced against the value of the foreign investor's successful claims.

To rely on counterclaim procedures, Article 46 ICSID Convention must be complied with. This requires the consent of the disputing parties to hear a counterclaim. To increase the likelihood of an ICSID arbitral tribunal applying a counterclaim, consent to counterclaims should be phrased in wide terms permitting 'any' or 'all' disputes to be heard by the tribunal. Further, a sufficient nexus between international investment law and international human rights law must be established. Although this element has been interpreted in a contentious manner, it remains possible to meet this criterion if a factual basis is used to establish the necessary connection between the counterclaim and the originating claim. This is likely to arise when a host state seeks to justify any breaches of the IIA by reference to the foreign investor's violations of international human rights law.

Finally, a host state must be able to identify a breach of an obligation owed to it by the foreign investor. Based on a positivist interpretation of public international law, this can be sourced from a combination of international human rights law and international criminal law, or alternatively, from domestic law manifestations of

international human rights law. Further options could arise if a less restrictive theoretical foundation was applied.

As the foreign investor can be bound by obligations derived from international human rights law, it is necessary to consider whether ICSID arbitral tribunals can apply these standards. When determining whether international human rights law can be applied to a dispute before an ICSID tribunal the applicable law must be identified. This is determined by following the procedure in Article 42 ICSID Convention. Initially, the choice of law agreed by the disputing parties should be considered. International human rights law (and international criminal law) fall within the definition of international law. International human rights law can also be sourced from domestic law. In the absence of a choice of law, the ICSID arbitral tribunal may apply both domestic law and international law. Still, the degree to which international law can be referenced will depend on the interpretation of the second sentence of Article 42(1) of the ICSID Convention.

Having established this framework, it is possible to conclude that, in limited circumstances, a substantive host state human rights defence is feasible within ICSID arbitration. A procedural foundation exists that is capable of introducing international human rights law before an ICSID arbitral tribunal in the form of counterclaims and the applicable law of the ICSID arbitral tribunal permits its application.

6. CONCLUSION

The diversification and specialisation of public international law brought about the creation of *lex specialis* regimes. The extent to which these *lex specialis* regimes interact, or alternatively, fail to interact, has given rise to claims that public international law has undergone a process of ‘fragmentation’. The impact of ‘fragmentation’ is evidenced by the intersection between the *lex specialis* regimes of international investment law and international human rights law in investment disputes. This interaction is most likely to arise when host state regulatory conduct violates investment protection standards due to the host state seeking to comply with obligations drawn from the international human rights law regime. As a result, host states may find themselves in a position where they are faced with a normative conflict and, hence, potential international responsibility for their failure to comply with an international obligation drawn from either of these regimes. ICSID arbitration is not able to easily reconcile this conflict given its preference to resolve FDI disputes exclusively by reference to international investment law. This is a direct result of the historical context in which ICSID arbitration arose.

This thesis has argued that it is possible to reconcile the conflict that arises from the fragmented nature of the international investment law and international human rights law regimes by demonstrating a procedural basis on which a host state human rights defence can be established in ICSID arbitration. This evidences that the process of ‘de-fragmentation’ can be achieved.

Chapter 2 ascertained that a positivist conception of public international law, as opposed to a naturalist conception, provided the strongest theoretical basis for this thesis. Positivism was selected as it enabled the formulation of a widely acceptable and justifiable host state human rights defence and, thus, enhanced its credibility. A consent driven theoretical foundation foreclosed potential criticisms based on the selection of a theoretical basis that favoured the moral nature of a host state human rights defence. The implications of adopting a positivist approach are that foreign investors are not imbued with international legal personality unless it has been expressly or implied conferred by states. Although this may be perceived to be a conservative understanding of public international law, it reinforces the strong foundation required for a widely accepted host state human rights defence.

Additionally, the operation of the defence is based on a systemic viewpoint of public international law. The systemic nature of public international law was determined by reference to its unifying characteristics, namely, general principles and secondary norms. Further, definitions of the interrelated notions of ‘unity’ and ‘fragmentation’ were elaborated in order to enable the evaluation of the current relationship between international investment law and international human rights law. The term ‘unity’ refers to substantive unity, that is, unity that prevents conflict between substantive norms of public international law.¹ ‘Fragmentation’ refers to the process by which individual areas of public international law are becoming increasingly specialised and divided, that legal principles are becoming incoherent, and, as a consequence, public international law is losing general applicability and, simultaneously, its cohesiveness.² ‘Unity’ and ‘fragmentation’ exist simultaneously, however, when characteristics associated with fragmentation become too prominent, the lack of unity within public international law results in regime conflict. Hence, the host state human rights defence was subsequently established by reference to these concepts.

By utilising the notion of regime conflict, Chapter 3 demonstrated that the introduction of a host state human rights defence is necessary to ‘de-fragment’ international investment law and international human rights law. To achieve this, contemporary regime conflict was considered from three different perspectives: the attempted introduction of international human rights law in IIAs; the manner in which international human rights law arguments have been received by ICSID arbitral tribunals; and the role of *amicus curiae* in ICSID arbitration.

Initially, Chapter 3 evidenced the fragmented nature of international investment law and international human rights law in IIAs by reference to attempts by states to introduce provisions addressing international human rights law,

¹ M Prost, *The Concept of Unity in Public International Law* (Hart Publishing 2012) 48.

² ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) UN Doc A/CN.4/L.682 11; B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 *European Journal of International Law* 265–270; A-C Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’ (2009) 22 *Leiden Journal of International Law* 1–4; S Singh, ‘The Potential of International Law: Fragmentation and Ethics’ (2011) 24 *Leiden Journal of International Law* 23–24–25; E Guntrip, ‘Systemic Integration and International Investment Law’ in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law Volume 3 2010* (Hart Publishing 2012) 258.

international environmental law and international labour standards into their Model BITs. The absence of provisions addressing international human rights law in IIAs can be attributed to the conflicting views of lobby groups. Lobby groups seek to establish either a ‘private’ or a ‘public’ form of international investment law. The political ramifications for a state of reconciling these competing perspectives leads to the conclusion that a host state human rights defence will not be directly included in the terms of an IIA. Instead, the introduction of a host state human rights defence is reliant on ICSID arbitral practice.

ICSID arbitral practice also highlights the fragmentation of international investment law and international human rights law. To identify the manner in which ICSID arbitral practice currently addresses regime conflict between international investment law and international human rights law, arbitral awards with broadly similar facts were compared. This permitted the approach taken by ICSID arbitral tribunals to be isolated. To undertake this analysis, ICSID arbitral awards addressing international human rights law arguments in the context of the Argentine financial crisis of 2001/2002 were considered. Following this review, two factors were identified that currently preclude the operation of a host state human rights defence in ICSID arbitration. First, it was shown that host states are reluctant to run defences based on their obligations in international human rights law given that this may lead them to be liable for breaches of public international law in two fora. Second, it was demonstrated that the attitude of the arbitrator towards international human rights law has the potential to influence the acceptance and, thus, viability of a host state human rights defence. Again, a distinction between a ‘private’ view of international investment law and a ‘public’ view of the same regime was discerned.

Chapter 3 also argued that *amicus curiae* procedures, despite being a means of introducing international human rights law into ICSID arbitration, are unable to effectively ‘de-fragment’ international investment law and international human rights law. This is due to the unique nature of an *amicus curiae*’s role, which is limited to advising an ICSID arbitral tribunal on general considerations that relate to the dispute. Further, so as to protect the disputing parties, ICSID arbitral tribunals must restrict the influence of *amicus curiae* on the ICSID arbitral process.

Consequently, this thesis demonstrated the need for a host state human rights defence to bring about the ‘de-fragmentation’ of international investment law and international human rights law. Based on the considerations identified in Part A, it was concluded that, in order to be effective, a host state human rights defence would need to be created independently of IIAs, but would still need to form part of ICSID arbitral practice. Further, a host state human rights defence would need to minimise the risk of a host state being found internationally responsible in two dispute resolution fora. Finally, *amicus curiae* submissions could support, but not form the basis of a host state human rights defence.

Part B identified two bases on which a host state human rights defence could be established, namely, a procedural host state human rights defence and a substantive host state human rights defence. Chapter 4 argued that a procedural host state human rights defence, which would preclude an ICSID arbitral tribunal from proceeding to the merits stage of the dispute, was not viable. ‘In accordance with host state law’ clauses are unable to fulfil this role, primarily due to the need for the violation of international human rights law to arise in the pre-establishment phase of the investment. The possibility of denying jurisdiction by reference to the admissibility of the claim was examined based on international public policy considerations. Admissibility is potentially subject to the same temporal limitations as ‘in accordance with host state law’ clauses, and was also shown to be inadequate as a basis for the defence given its vague content. General policy considerations also militated against the use of a procedural host state human rights defence, as the complexity involved in merging international investment law and international human rights law was better addressed by an ICSID arbitral tribunal at the merits stage of the ICSID arbitration. Although Chapter 4 took a conservative stance, this was to ensure that the host state human rights defence is able to operate in an equitable manner so as to confer it with credibility.

Chapter 5 argued that a substantive host state human rights defence would display the desired attributes of the defence. It was shown that counterclaim procedures provide the most viable means of introducing international human rights law into ICSID arbitration as compared to the defences currently used by host states. This is despite the inability of counterclaims to preclude host state liability in public international law. Instead, any compensation awarded to the foreign investor is

balanced against compensation owed to the host state for the violations of international human rights law. The disputing parties' consent frequently encompasses counterclaims. To facilitate the use of counterclaims with certainty, the express consent of the disputing parties is preferable. Further, a sufficient nexus can be established between international investment law and international human rights law based on a factual, rather than a legal, connection between the claims. Finally, foreign investors are capable of being directly bound by obligations sourced in international human rights law through international criminal law provisions and domestic manifestations of international human rights law. Both international human rights law (and international criminal law), in addition to domestic provisions reflecting international human rights law, fall within the applicable law of ICSID arbitral tribunals. On this basis, this thesis confirmed that international human rights law arguments could be brought before an ICSID arbitral tribunal by a host state and that the tribunal could apply this law when deciding the claim. Thus, Chapter 5 establishes a potential means by which a host state human rights defence could operate.

International human rights law has been raised in an increasing number of investment disputes and the potential remains for FDI to breach international human rights law standards. Specific concerns have been raised in relation to indigenous rights, the 'right' to water and environmental and labour standards. ICSID arbitral tribunals have yet to reconcile host states' international investment law and international human rights law obligations. In the absence of an accepted methodology that enables the reconciliation of these two *lex specialis* regimes, host states face the possibility of norm conflict and either the foreign investor or the host state population risks losing protection under public international law.

While it has been argued that the international investment law and international human rights law regimes are fragmented, this thesis has proven it is possible to 'de-fragment' them in the context of ICSID arbitration. Thus, it is possible for states to balance their obligations under international investment law and international human rights law by utilising the host state human rights defence outlined in this thesis. A positivist conception of public international law was employed in order to provide the most credible legal basis for a host state human rights defence. Even within a positivist conception of public international law, it has been

possible to identify a procedural basis that allows host states to defend themselves against the claims of foreign investors on the grounds that the foreign investor has violated international human rights law. Should a more liberal theoretical framework be adopted, there is further scope for the development of a host state human rights defence. This suggests that the ILC was correct when it stated that public international law is 'not a random collection' of norms.

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